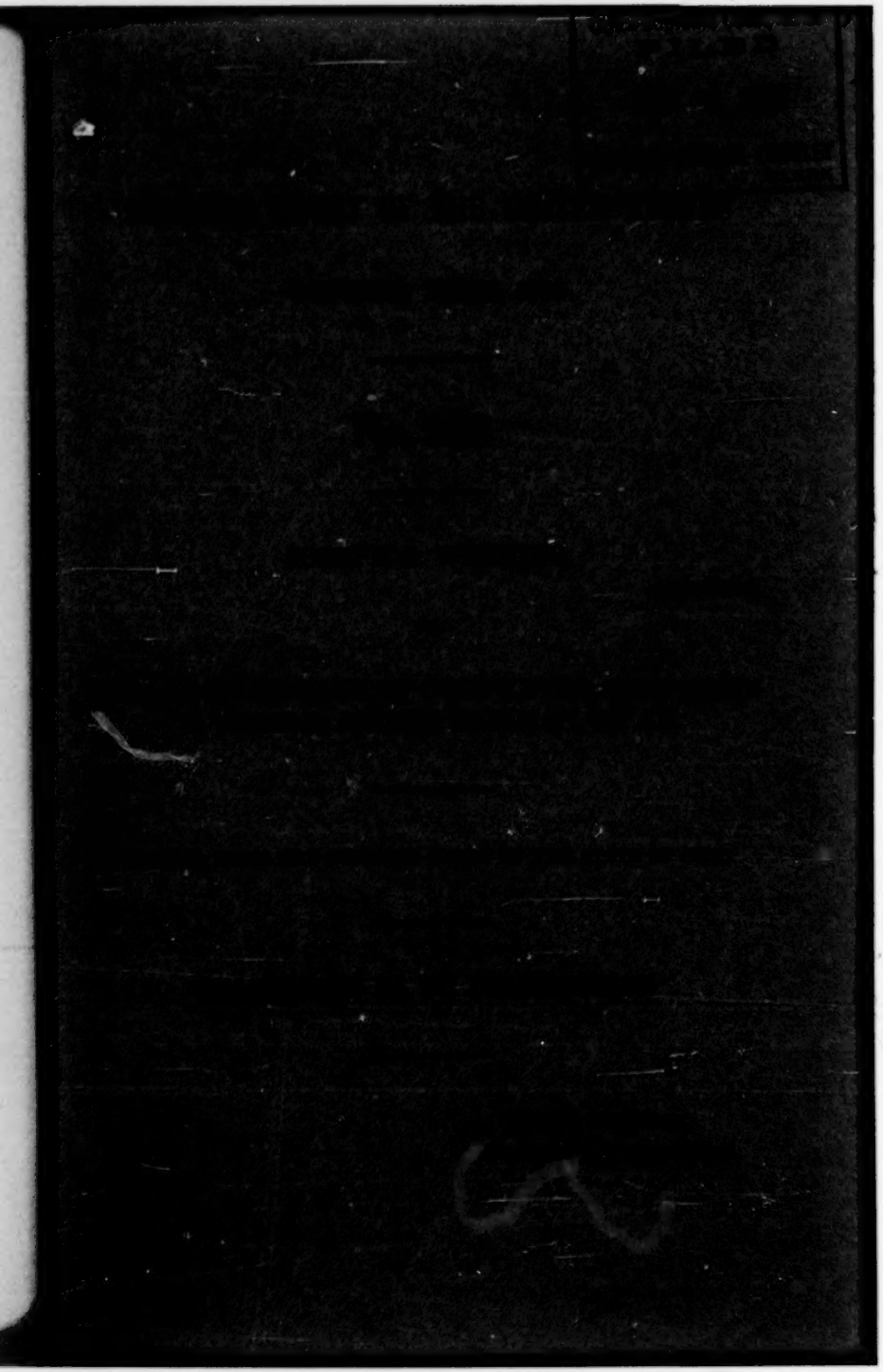

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGLE, JOSEPH PLEIMAN, GEORGE FRONING, EMMA FRONING, LAWRENCE M. DAVIS, RALPH J. AHLERS, THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF HARTFORD, CONNECTICUT

STATEMENT IN SUPPORT OF JURISDICTION

A

The statutory provision which sustains the Jurisdiction of the Supreme Court of the United States is Title 28 USC, section 1257, which as here pertinent to this petition for appeal, reads as follows:

Section 1257. State Court; appeal:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision in favor of its validity."

B

Statutes the Validity of Which Is Involved

STATUTE OF THE UNITED STATES

The statute of the United States which is drawn in question and the validity of which was denied by the judgment below, said judgments being against its validity, is 11 USC, section 203. The pertinent provisions thereof are:

11 USC, section 203 (c), ed. of 1934:

"(c) At any time within five years after March 3, 1933, a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debt."

11 USC, section 203 (n) ed. of 1934 (effective March 3, 1933):

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located to the exclusive jurisdiction of the court." . . .

11 USC, section 203 (n), Supplement III, ed. of 1934, (effective August 28, 1935):

"(n) The filing of a petition" . . . "praying for relief under this section, shall immediately subject the farmer and all his property, wherever located, for all the purposes of this section, to the exclusive jurisdiction of the court, including all real or personal property, or any equity or right in any such property," . . .

11 USC, section 203 (o), ed. of 1934:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand;

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recission, or specific performance of an agreement for sale of land or for recovery of possession of land;

(3) Proceedings to acquire title to land by virtue of any tax sale:

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

11 USC, section 203 (p), Supplement III, ed. of 1934, as applied by the Court in *Kalb* v. *Feuerstein*, 308 U. S. 433, to a petition filed in a United States Court under said section 203 on precisely the same date, October 2, 1934, as the petition of this appellant, Joseph G. Wenning, was filed in a United States Court under the same section:

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or

under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

Prior to August 28, 1935, the above subsection (p) had read in 11 USC, section 203 (p), ed. of 1934, as follows:

"(p) The prohibitions of subdivision (o) shall not apply to proceedings for the collection of taxes, or interest or penalties with respect thereto, nor to proceedings affecting solely property other than that used in farming operations or comprising the home or household effects of the farmer or his family."

STATUTES OF OHIO

General Code of Ohio, section 11588; Laws of Ohio, Volume 115, Part 2, page 327; Volume 116, page 10; Volume 117, page 83, also found in Throckmorton's Ohio Code, 1948 Edition, at page 460, has so far as the following quotation is concerned) which is the only pertinent part for this appeal) at all times read as follows:

"When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

General Code of Ohio, section 11688, Throckmorton's Ohio Code, 1948 edition, page 498:

"11688. Confirmation and order for deed.—Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry of the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R.S. 5398.)"

General Code of Ohio, section 11690, Throckmorton's Ohio Code, 1948 edition, page 499.

> "11690. Judgment debtor may redeem any time before confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale." . . .

C

Date of Judgment and Date of Application for Appeal

The date of the judgment of the Supreme Court of the State of Ohio of which a review is now sought was March 22, 1950. The appellant's Motion for Rehearing was denied on April 12, 1950, whereupon said judgment was finally entered. The time for taking this appeal began to run April 12, 1950, when the rehearing was denied.

The date of the presentation of this application for appeal is July 7th, 1950.

Title 28 USC, section 2101(c), provides that this appeal shall be applied for within ninety days after the entry of the judgment appealed from. This application is filed within that period.

D

Nature of the Case and Rulings Below Which Bring the Case Within the Jurisdictional Provisions Relied upon

On February 28, 1949, the appellant filed his Second Amended Petition (uniformly referred to as Petition) in the cause out of which this appeal stems, that is, case number 13503 in the Common Pleas Court of Mercer County, Ohio, in which he sued the presumed purchasers of his real estate and their grantees, the sheriff and the deputy who presumed to sell his real estate in foreclosure, and their sureties seeking cancellation of certain deeds of conveyance which had purported to convey title to his real estate out of him by

authority of proceedings in a preceding foreclosure action in the same Court in case number 12534. He sought also accounting from the respective grantees under such deeds for rents and profits and for damages and other relief.

The real estate involved in said case number 13503 which developed into this appeal and that involved in the preceding foreclosure case number 12534 was the same real estate which he had while the foreclosure action was pending in case 12534, subjected to the sole jurisdiction of the United States Court by filing his petition under Title 11 USC, section 203. This United States Statute is commonly known as the farmer debtor law and being section 75 of Chapter VIII of the Bankruptcy Act entitled, "Proceedings for the Relief of Debtors" which contains other debtor provisions for railroads, corporations, etc.

That United States statute, Title 11 USC, Section 203, has been adjudicated in more than a score of cases in the Supreme Court of the United States, particularly in *Kalb* v. *Feuerstein*, 308 U. S. 433, wherein it was held that upon the filing of a petition by a farmer debtor under said United States statute, sections 203(n), 203(o), and 203(p) thereof automatically and peremptorily deprived a state court, its officers and agents of all power and jurisdiction in any foreclosure action then pending to continue or maintain such foreclosure action in any manner and made any attempt by judge, sheriff or mortgagee to maintain such foreclosure action in contravention of such statute subject to collateral attack.

The validity of this statute of the United States under the Constitution of the United States, and the validity of the statutes of the State of Ohio, authorizing and controlling foreclosures proceedings as repugnant to the law and Constitution of the United States were fully argued in the said Common Pleas Court where the case number 13503 originated. The decision of the Common Pleas Court was

against the validity of the United States statute and in favor of the state statutes.

The Memorandum (opinion) of the Judge of the Common Pleas Court rested the decision and judgment of the court solely upon the validity of the state laws, especially General Code sections 11588, 11688 and 11690 and the inapplicability of the United States statute, holding that even if the state court foreclosure proceedings violated the United States statute, the error was merely voidable and not subject to collateral attack, which was precisely what the Supreme Court of Wisconsin held in the case which was reversed in *Kalb* v. *Feuerstein*, 308 U. S. 433. The judgment denied the petition *in toto* without considering any of the other matters of accounting, damages, etc. The appellant filed and argued two motions seeking reformation of the decision and judgment of the Common Pleas Court, setting up the question of the validity of the Ohio statutes controlling foreclosures and the validity and applicability of the United States statute and Constitutional provisions, were denied.

The appellant appealed to the Court of Appeals of Ohio for Mercer County assigning as error that the judgment violated the Constitution of the United States and the laws passed in pursuance thereof, that the judgment was contrary to law and was not sustained by the evidence.

The United States statute and the United States Constitutional provisions sustaining it and the invalidity of the Ohio statutes were fully argued in the State Court of Appeals. That court in its holding and judgment affirmed the Common Pleas Court, holding that the proceedings and acts of the lower court were merely ministerial acts not inhibited, prohibited or precluded by the filing of the appellant's petition in the United States Court, and furthermore even if the acts which were performed in the Common Pleas Court *were wholly void* the Common Pleas Court could later make them lawful and operative and such later action of the

Court was not void but *voidable* and not subject to collateral attack. This judgment of the Court of Appeals was based entirely upon the question of the validity of the State laws which the appellant had drawn in question as repugnant to the Constitution of the United States and were held valid, and upon the question of the validity of the United States statute which the appellant had drawn in question and the decision was against its validity.

Thereupon the appellant appealed to the Supreme Court of the State of Ohio by filing his motion to certify and also his appeal as of right upon the ground that a Federal Constitutional question was involved. The motion to certify and the appeal as of right were briefed and argued in the Ohio Supreme Court raising the same questions and drawing in question the validity of the law and Constitution of the United States. The Supreme Court of the State of Ohio on March 22, 1950, overruled the motion to certify and dismissed the appeal as of right without any opinion, and on April 12, 1950 denied appellant's Application for Rehearing thus making its entry of judgment final and in effect rendering its decision in favor of the the validity of the state laws and against the validity of the statute and Constitution of the United States.

E

Cases Sustaining the Jurisdiction of the Supreme Court of the United States

1. That the period for presenting application for appeal begins with the denial of a rehearing: *Aspen* v. *Billings,* 150 U. S. 31, 36; *Gypsy* v. *Escoe,* 275 U. S. 498, and a long series of decisions uniformly in accord.

2. That appeal is to be taken from the Supreme Court of the State of Ohio and not from the Court of Appeals of Ohio when the Supreme Court of Ohio dismisses an appeal

as of right on a Constitutional question and denies a motion to certify is settled by decisions of the Supreme Court of the United States in several appeals from Ohio: *Mathews* v. *Huwe*, 269 U. S. 262; *Hetrick* v. *Lindsey*, 265 U. S. 384, both opinions by Chief Justice Taft of Ohio; and *Van Huffel* v. *Harkelrode*, 284 U. S. 225, opinion by Justice Brandeis, citing the Taft opinion; *Martin* v. *Struthers*, 319 U. S. 141.

3. That a decision of a state Supreme Court holding that proceedings conducted in a state court while a petition under Title 11 USC, section 203, is filed in a United States Court are not void but voidable and not subject to collateral attack is within the jurisdiction of the United States Supreme Court on appeal: *Kalb* v. *Feuerstein*, 308 U. S. 433.

4. That a decision of a state court holding that a state statute or municipal ordinance of a state does not violate a United States law or the United States Constitution therein drawn in question is subject to the jurisdiction of the United States Supreme Court on appeal: *Martin* v. *Struthers*, 319 U. S. 141; *Giboney* v. *Empire*, 336 U. S. 490.

5. That a decision of a state court holding that state statutes governing foreclosure in state courts are not automatically and peremptorily nullified by a United States Statute enacted pursuant to Article I, Section 8, Fourth Clause granting to the Congress power to legislate on the subject of bankruptcies is within the jurisdiction of the Supreme Court of the United States on appeal: *Kalb* v. *Feuerstein*, 308 U. S. 433.

6. That a state court decision holding that a state law is valid against a statute of the United States pursuant to the Constitution of the United States, thereby drawing in question Article VI, is within the jurisdiction of the United States Supreme Court on appeal: *McCullough* v. *Maryland*, 4 Wheaton (U. S.) 316.

7. That a state court decision holding that a state law is valid against the Fourteenth Amendment, thus drawn in question, is within the jurisdiction of the United States Supreme Court on appeal: *Wheeling* v. *Glander*, 337 U. S. 502.

8. In discussing the provision of the Judicial Code which was later section 237a and now is Title 28, section 1257(1) and (2) relating to appeals from state courts, it was said in *Murdock* v. *Memphis*, 20 Wallace (87 U. S.) 590: "It has been many times decided by this court on motions to dismiss this class of cases for want of jurisdiction, that if it appears from the record that the plaintiff in error raised and presented to the court by pleadings, prayer for instructions or other appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this court attached, and we must hear the case on its merits."

F

The Questions Involved Are Substantial

There is no disputed question of fact. All of the facts involved are matters of record. A foreclosure action against real estate was pending in the state court. While it was pending a petition under 11 USC, section 203, was filed in the United States Court involving that real estate. While such a petition was so pending certain proceedings were maintained in the foreclosure action. The sole question is whether the appellant's title to that real estate can be conveyed away from him by the authority and validity of such proceedings, and whether those proceedings are subject to collateral attack.

The Constitution of the United States, the statute enacted pursuant to it and the decisions of this court clearly and

unequivocally make and declare such proceedings to be absolutely void utter nullities, as if never done and that they are subject to collateral attack.

The said proceedings were in clear, open defiance of the authority of the United States and the decisions of the state courts below are categorical challenges to the authority and supremacy of the United States, the Constitution of the United States, the laws of the United States and the decision of the Supreme Court of the United States.

There can not be one interpretation of the relation between state laws and the United States laws in Wisconsin and another interpretation in Ohio under the Constitution of the United States proclaimed by the people to be the "supreme Law of the Land" to which the judges in every state are thereby bound by oath, "any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding."

It is not a question of the mere *enforcement* of a *valid* state law but the enforcement of a state law made *invalid*, a "*nullity*", of "*no effect*," "absolutely void" (*Kalb* v. *Feuerstein*, 308 U. S. 433). It presents therefore a substantial question of the validity of the state law and the validity of the authority of the court officials. *Zucht* v. *King*, 260 U. S. 174, 177.

"The importance of preserving uniformity in the construction of the Constitution, laws and treaties of the United States must be felt by all; and the impracticability of maintaining this uniformity, unless the power of supervising all judgments in which the Constitution, laws or treaties of the United States may be drawn into question be vested in some single tribunal, is too apparent for controversy. The people of the United States have vested that power in this tribunal, and its highest duty is to exercise it with fidelity." *Davis* v. *Packard*, 8 Peters, (33 U. S.) 312, 323.

The jurisdiction reposed in the United States Supreme Court on appeal to review a decision of a state court is for the purpose of preventing "the courts of the several States from impairing or frittering away the authority of the federal government by giving a construction to its statutes adverse to such authority." *Missouri* v. *Andriano*, 138 U. S. 496, in the fourth paragraph from the end of the opinion.

". . . it is the duty of this court, in the exercise of its judicial power, to maintain the supremacy of the Constitution and laws of the United States" . . . *Harkrader* v. *Wadley*, 172 U. S. 148, 162.

"The appellate power, it will be observed, is conferred on this court in all cases or suits in which such a question" [concerning the Constitution and laws of the United States] "shall arise." . . . "And it is manifest that this ultimate appellate power in a tribunal created by the Constitution itself was deemed essential to secure the independence and supremacy of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every state; and to guard against evils which would inevitably arise from conflicting opinions between the courts of a state and the United States, if there was no common arbiter authorized to decide between them." *Ableman* v. *Booth*, 21 Howard (62 U. S.) 506.

"In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance, between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other." *In the Matter of Heff*, 197 U. S. 488, 505.

"On all questions arising under the Constitution and laws of the Union, this court may exercise a revising power;" [The Supreme Court of the United States did

so in the case of *Kalb* v. *Feuerstein*, 308 U. S. 433] "and its decisions are final and obligatory on all other judicial tribunals, State as well as federal. A State tribunal has a right to examine any such questions and to determine them, but its decision must conform to that of the Supreme Court, or the corrective power may be exercised." *Greene* v. *Neal*, 6 Peters (31 U. S.) 291, 298.

G

How the Federal Questions Were Raised

The federal questions were raised:

In the Court of first instance, the Common Pleas Court of Mercer County, Ohio, in the original petition and continued through intermediate revision by amendment to and in the Second Amended Petition (referred to by all parties generally as the Petition) and by arguments and briefing.

In the Court of Appeals of Ohio by Assignments of Error and in the briefs and argument on behalf of the appellant.

In the Supreme Court of the State of Ohio by assignments of error and by assignments of error and argument on behalf of the appellant.

In each of the three state courts the validity of the state laws was sustained as against the validity of the United States statute and the United States Constitution.

The following quotations support the foregoing statements:

From the Second Amended Petition (the "Petition"):

"On October 2, 1934, and prior thereto and continuously therefrom until the present the plaintiff has been and is the owner of the following described farm real estate which was his home, namely:"

* * * * * * *

"On said date, October 2, 1934, the plaintiff filed in the District Court of the United States for the Northern Dis-

trict of Ohio, at Toledo, in Case Number 11200 his petition as a farmer debtor, under Title 11, United States Code, Section 203, sub-sections (a) to (r), for the composition and extension of his debts and the said petition was by order of said United States Court approved and referred to a conciliation commissioner for administration. Thereafter on October 16, 1934 in the Common Pleas Court of Mercer County, Ohio, in a case entitled *The Peoples Bank Company* v. *Wenning*, No. 12534, which case had been pending on October 2, 1934, this said court purported to render a judgment and decree against this plaintiff for money and foreclosing a certain mortgage on said land. Thereafter this court purported to issue an execution on said judgment and decree. Said judgment decree, and execution were rendered and issued while said United States Court Case 11200 was pending and were wholly void and or no effect by the terms of said United States Statute, Title 11, United States Code, Section 203.

Said petition in said United States Court Case 11200 for composition and extension having failed of its purpose, this plaintiff thereafter on January 28, 1938, filed in said United States District Court in Case No. 14344 his petition as a farmer debtor under said Title 11, United States Code, Section 203, Subsections (a) to (r), for composition and extension of his debts and the said petition was by order of said United States Court approved and referred to a conciliation commissioner for administration.

Thereafter in said foreclosure Case No. 12534, which had been pending continuously in this court since its original filing, and while said case No. 14344 was still pending in said United States Court, and without any authorization by said United States Court, this court issued a purported order of sale and order of appraisement and a purported appraisement was made thereon. Said purported order of

sale and order of appraisement, said purported appraisement and return thereof were all wholly void and of no effect by the terms of said United States Statute, namely Title 11, United States Code, Section 203.

Said cause for composition and extension in Case 14344 proceeded to its completion, whereupon this plaintiff duly filed in said United States Court his Amended Petition under Title 11, United States Code, Section 203 (s), pursuant to which amended petition and said United States Statute said United States Court adjudicated this plaintiff a farmer debtor bankrupt and referred said Amended Petition to a conciliation commissioner for administration. Thereafter said conciliation commissioner duly issued and served upon the judge of this court, upon the sheriff of this county, and upon the attorney for the holder of the first mortgage upon real estate of the plaintiff, namely the Federal Land Bank of Louisville, a restraining order, restraining said judge, said sheriff and said land bank, from proceeding in this Common Pleas Court with said foreclosure case against this plaintiff and his farm real estate.

Notwithstanding the terms of said United States Statute, namely, Title 11, United States Code, Section 203, and notwithstanding the said restraining order, this court, and the sheriff of this county, illegally purported to sell and purportedly sold said real estate as if in foreclosure. Said purported sheriff's sale was void and of no effect.

Thereafter this court purported to confirm said void sale but said purported confirmation was wholly void and of no effect. Upon said purported sale and said purported confirmation of sale this court illegally dispossessed this plaintiff from his said real estate. Said sheriff executed and delivered a form of deed conveying said real estate to the purported purchaser at said void form of sheriff's sale, which deed was wholly void and of no effect as to this plaintiff."

From the "Memorandum" of the Judge of the Common Pleas Court:

"Mr. McClain on page 15, Item Fourteenth of his brief does not contend that the Court of Common Pleas at this time 47 days after Mr. Wenning's Petition had been dismissed by the Federal Court did not have jurisdiction and power but contended the Court's entry of December 17, 1938, to be void because there was nothing to sustain it.

In fact there was a previous valid order on June 26 finding for the Federal Land Bank, ordering Foreclosure, ordering appraisal and ordering sale.

All the intervening acts between January 26, 1938, and December 17, 1938, were ministerial procedural acts under the provisions of the Statutes of the State of Ohio which same Statutes provide (G.C. Sec. 11688) that the Court, as was done in this case on December 17, 1938, examine the proceedings of its officers, and if found to be in accordance with the statutes shall confirm same and order a deed.

If any of said ministerial acts validly ordered by the Court were irregular or void, do not the Ohio Statutory provisions which provide for the procedure provide that it is the Court of this State which shall make the determination as to the validity of those acts? Certainly the Common Pleas Court on December 17, 1938, had both the jurisdiction and the power to make the determination made and if the Court did not commit error the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error. There has been no conflict in this case with either Federal Law or with the Constitution of the United States. This case was pending nearly five years in the Court of Common Pleas. The Court of Common Pleas made no order between January 28, 1938, and October 10, 1938. Under provisions of Ohio Law (G. C. Sec. 11690) the right of

redemption of the judgment debtor continued up to the time of the Court's order on December 17, 1938, and the possession of the plaintiff was not interferred with until after December 17, 1938, when in accordance with the order of December 17, 1938, a writ of possession was issued." . . .

"On December 31, 1941, nearly three years later, he filed the petition in this case now before the Court seeking to collaterally attack the aforementioned orders of the Court in Case No. 12534, none of which orders were made at a time when the plaintiff had a petition pending in Federal Court, and as to all of which plaintiff was afforded trial and right of direct attack appeal, as provided by law." (Note: It should be said that certain factual statements in the foregoing are not, in the opinion of counsel for appellant, supported by the evidence.)

In motions to Set Aside the Judgment and for a New Trial in the Common Pleas Court:

"9. The said order and decree of judgment is in violation of the Constitution of the United States and of the laws passed in pursuance thereof."

"11. The said finding, verdict or decision of the court is in violation of the Constitution of the United States and of the laws passed in pursuance thereof."

In the Court of Appeals of Ohio in Assignment of Error:

"1. The judgment violated the Constitution of the United States and the laws passed in pursuance thereof."

In the Opinion of the Court of Appeals of Ohio:

"The action is one in which the plaintiff seeks to have set aside as void, certain judgments rendered and proceedings had and conveyance of real estate authorized, in an action in the Court of Common Pleas of said county, wherein The Peoples Bank Company of Coldwater, one of the defendants herein, was one of the plaintiffs, and the plaintiff herein

was one of the defendants, the action being for determination of liens, the marshaling of liens, foreclosure of mortgage, and other equitable relief, and being Cause No. 12534 in said Court of Common Pleas."

"The appraisal, advertising for sale, and sale, of the real estate by the sheriff were not judicial acts, but merely ministerial acts, the performance of which was not inhibited, prohibited or precluded in any way by reason of the filing by plaintiff, of a new farmer-debtor petition on January 28, 1938. Said acts were therefore performed in due course of law.

The appraisal, advertising for sale, and sale of said real estate by the sheriff, not being judicial acts but merely ministerial acts, the Common Pleas Court, on December 17, 1938, being then free to fully exercise its jurisdiction in said foreclosure proceeding, had jurisdiction and power to render judgment confirming said sale, and its judgment may not be set aside in this action.

Furthermore, if said acts of the sheriff in the respects mentioned had been wholly void, the action of the court in confirming said sale was within its jurisdiction and power, and was not void but merely voidable, and subject to attack only through error proceedings resecuted from said judgment, and not by separate action such as the plaintiff seeks to maintain."

(Note: Certain statements in this opinion are also controverted.)

In the Supreme Court of the State of Ohio in Assignments of Error

"On Constitutional Questions

The Court of Appeals erred:

1. In failing to be bound by the provisions of the Constitution of the United States of America.

2. In failing to be bound by a statute of the United States of America, namely, Title 11, Section 203, U.S.C."

"On the Motion to Certify

The Court of Appeals erred:

1. In failing to be bound by the provisions of the Constitution of the United States of America.

2. In failing to be bound by a statute of the United States of America, namely Title 11, Section 203 USC."

No opinion was given out by the Supreme Court of the States of Ohio. The advance report of the decision of the Court is found in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as 153 OS 583. This volume and page will be the official report and the text will appear in the official report of the decision as it now appears in the "Ohio Bar," namely:

Wenning v. *Peoples Bank*, 153 OS 583:

"Wenning, Appellant, v. The Peoples Bank of Coldwater, Ohio, et al., Appellees

Supreme Court—Dismissal—No debatable constitutional question involved—Conflict of law—Land foreclosure proceedings instituted in Common Pleas Court, September 7, 1934,—October 2, 1934, petition filed in federal court under farmer-debtor law—Section 203, Title 11, U. S. Code—Common Pleas judgment for P. bank, October 16, 1934—

Farmer-debtor proceeding terminated January 7, 1935—Farmer-debtor petition dismissed August 6, 1935—Common Pleas judgment for F. Bank and foreclosure January 26, 1938—Second farmer-debtor petition filed, January 28, 1938—Common Pleas order of sale and appraisal, January 31, 1938—Sale advertisement, February 10, 1938—February 24, 1938, Second farmer-debtor proceedings terminated February 24, 1938—Amended farmer-debtor petition filed March 2, 1938, and administration reference—Restraining order to Common Pleas Court, March 9, 1938—Second farmer-debtor petition dismissed, October 10, 1938—Sale, March 12, 1938—Confirmation of sale, December 17, 1938, Federal jurisdiction of bankruptcies—Section 8, Article I, U. S. Constitution—Federal judicial power where vested—Section I, Article III, U. S. Constitution—Supremacy of federal law—Section 7, Article XV, Constitution—Article VII, U. S. Constitution.

(No. 32075—Decided March 22, 1950).

APPEAL from the Court of Appeals for Mercer county.

Mr. Elmer McClain, for appellant.

Mr. Henry J. Knapke, Mr. Carleton Reiser and Mr. David Armstrong, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C.J., MATTHIAS, HART, ZIMMERMAN, STEWART, TURNER AND TAFT, JJ., Concur."

The announcement of the denial of rehearing was reported in the "Ohio Bar" issue of April 17, 1950, (Volume XXIII, No. 4), on page 54, as follows:

"April 12, 1950."

"Rehearings denied."

"32075 Joseph G. Wenning, Appellant, v. The Peoples Bank of Coldwater, et al., Appellees. Mercer County."

Therefore the appellant, Joseph G. Wenning, respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Title 11 USC 1257a (1) and (2).

Respectfully submitted,

ELMER MCCLAIN,
Attorney for Joseph G. Wenning,
Appellant.

Lima, Ohio.
June 30, 1950.

Office - Supreme Court, U. S.
FILED
OCT 6 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING, *Petitioner*,

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

BRIEF FOR RESPONDENTS THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL AND JOSEPH PLEIMAN IN OPPOSITION.

HENRY J. KNAPKE,
Celina, Ohio,

KAHL K. SPRIGGS,
Washington, D. C.,
Attorneys for Respondents

The Peoples Bank Company of Coldwater, Ohio; John C. Weigel, and Joseph Pleiman.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

FILED
SEP 6 1950
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM 1950.

No. 293

JOSEPH G. WENNING,

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Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ELMER MCCLAIN,
Lima, Ohio

Counsel for Petitioner, Joseph G. Wenning.

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAKEVIEW 5-6581

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IN THE

Supreme Court of the United States

OCTOBER TERM 1950.

NO. _____

JOSEPH G. WENNING,

Petitioner,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGLE; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

PETITION.

(The Brief in support of this petition begins at page 21. All emphasis in both Petition and Brief is supplied unless stated otherwise.)

To the Honorable Fred M. Vinson, Chief Justice, and Associate Justices of the Supreme Court of the United States.

Your petitioner respectfully shows:

I.

A SUMMARY STATEMENT OF THE MATTER INVOLVED.

1. The Issues.

First Issue. The validity of certain statutes of the United States, namely Title 11 USC, section 203 subsections (a) to (r), particularly subsections (n) (o) and (p) and Section 203, subsection (s) is drawn in question.

Second Issue. The validity of certain statutes of the State of Ohio, particularly General Code, Sections 11588, 11688, and 11690, is drawn in question as being, in their application, repugnant to the Constitution and the laws of the United States.

Third Issue. The title, right, privilege and immunity set up and claimed by the petitioner under the Constitution and statutes of the United States.

Fourth Issue. The right, privilege and immunity set up and claimed under an authority exercised under the United States through a conciliation commissioner of the United States.

Fifth Issue. Whether state courts may finally decide a federal question not in accord with applicable decisions of this Court.

Sixth Issue. Whether a state court and its officers and litigants therein may disregard a restraining order issued

and served by an officer of the United States, namely a conciliation commissioner, issued and served by authority exercised under the United States.

Seventh Issue. Whether the petitioner has not been deprived of his property without due process of law and denied equal protection of the laws by the State of Ohio in violation of the Fourteenth Amendment to the Constitution of the United States.

Eighth Issue. Whether the courts of the State of Ohio have not violated Article I, Section 8, Fourth Clause of the Constitution by sanctioning authority exercised by an Ohio Court to supercede the laws of the United States on the subject of bankruptcies.

Ninth Issue. Whether the courts of Ohio have not sanctioned disregard of Article VI of the Constitution by an Ohio court in its disregard of the Constitution and laws made in pursuance thereof.

Tenth Issue: Whether any act, order or proceeding of a court which is performed or issued by the judge of a court, which judge and court are each without any power, authority or jurisdiction, wherefore said act, order or proceeding is a nullity and utterly void, may later *ex post facto* be made to be effective as if never void or a nullity.

2. The Statutory Law.

Statutes of the United States.

The statutes of the United States, the validity of which is drawn in question and under which the petitioner claims title, right and immunity is Title 11 USC, section 203, usually referred to as Section 75 of the Bankruptcy Act

or the farmer debtor law, consisting of two parts separately enacted, namely (1) subsections (a) to (r), and (2) subsection (s). The pertinent provisions thereof are:

11 USC, section 203 (c), ed. of 1934, [Sec. 75(c)]:

"(c) At any time within five years after March 3, 1933", [which date was extended at various times by appropriate legislation] "a petition may be filed by any farmer, stating that the farmer is insolvent or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts."

11 USC, section 203(n), ed. of 1934 [Sec. 75(n)]:

"(n) The filing of a petition pleading for relief under this section shall subject the farmer and his property, wherever located to the exclusive jurisdiction of the court." . . .

11 USC, section 203(n), Supplement III, ed. of 1934 [Sec. 75(n)], effective August 28, 1935, did not materially change the foregoing.

11 USC, section 203 (o) [Sec. 75 (o)], ed. of 1934:

"(o) Except upon petition made to and granted by the judge after hearing and report by the conciliation commissioner, the following proceedings shall not be instituted, or if instituted at any time prior to the filing of a petition under this section, shall not be maintained, in any court or otherwise, against the farmer or his property, at any time after the filing of the petition under this section, and prior to the confirmation or other disposition of the composition or extension proposal by the court:

(1) Proceedings for any demand, debt, or account, including any money demand:

(2) Proceedings for foreclosure of a mortgage on land, or for cancellation, recission, or specific performance of an agreement for sale of land or for recovery of possession of land:

(3) Proceedings to acquire title to land by virtue of any tax sale:

(4) Proceedings by way of execution, attachment, or garnishment;

(5) Proceedings to sell land under or in satisfaction of any judgment or mechanic's lien; and

(6) Seizure, distress, sale, or other proceedings under an execution or under any lease, lien, chattel mortgage, conditional sale agreement, crop payment agreement, or mortgage."

11 USC, section 203(p) [Sec. 75(p)] Supplement III, ed. of 1934. (Although this enactment was an amendment of a previous subsection (p) it is the one quoted by this court in *Kalb* v. *Feuerstein*, 308 US 433, a farmer debtor case filed in the federal court on the very same date, October 2, 1934, that the first Wenning farmer debtor case was filed in the federal court, and involving the same chief issues):

"(p) The prohibitions of subsection (o) shall apply to all judicial or official proceedings in any court or under the direction of any official, and shall apply to all creditors, public or private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in this section."

On June 28, 1934 there was enacted an amendment, 11 USC, section 203(s), [Sec. 75(s)], ed. of 1934, usually referred to as the "original Sec. 75(s)", providing a mortaorium for cases in which the provisions of sections 75(a) to (r) had not been effective. This sec. 75(s) was held to be unconstitutional in *Louisville* v. *Radford*, 295 US 555.

Thereafter a replacement was enacted, 11 USC section 203(s), Supplement III, ed. of 1934, [Sec. 75(s)] which was held to be constitutional in *Wright* v. *Vinton*, 300 US 440.

The Ohio Statutes.

The following Ohio statutes were drawn in question on the ground of their being repugnant to the Constitution and laws of the United States:

General Code of Ohio, section 11588; Laws of Ohio, Volume 115—Part 2—page 327; Volume 116, page 10; Volume 117, page 83, also found in Throckmorton's Ohio Code, 1948 Edition at page 460. So far as the following quotation is concerned (which is the only pertinent part for this appeal) this Ohio statute at all times read as follows:

> GC 11588: "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

General Code of Ohio, section 11688, Throckmorton's Ohio Code, 1948 edition, page 498.

> GC 11688. "Confirmation and order for deed.—Upon the return of any writ of execution for the satisfaction of which lands and tenements have been sold, on careful examination of the proceedings of the officer, if the court finds that the sale was made, in all respects, in conformity to the provisions of this title, it shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and that the officer make to the purchaser a deed for the lands and tenements. (R.S. 5398.)"

General Code of Ohio, section 11690, Throckmorton's Ohio Code, 1948 edition, page 499.

> GC 11690. "Judgment debtor may redeem any time before confirmation.—In sales of real estate on execution or order of sale, at any time before the confirmation thereof, the debtor may redeem it from sale" . . .

3. The Decisions of the Courts Below.

In the Supreme Court of Ohio.

No opinion was rendered by the Supreme Court of the State of Ohio. The advance report of the decision of that court is found in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as 153 OS 583. This volume and page will be the official report and the text will appear in the official report of the decision as it now appears in the Ohio Bar, namely: and in the Record at folio page 137, (R.).

Wenning v. *Peoples Bank*, 153 OS 583:

"*Wenning, Appellant*, v. *The Peoples Bank of Coldwater, Ohio, et al., Appellees.*

Supreme Court—Dismissal—No debatable constitutional question involved—Conflict of law—Land foreclosure proceedings instituted in Common Pleas Court, September 7, 1934,—October 2, 1934, petition filed in federal court under farmer-debtor law—Section 203, Title 11 US Code—Common Pleas judgment for P. bank, October 16, 1934—Farmer debtor proceeding terminated January 7, 1935—Farmer-debtor petition dismissed August 6, 1935—Common Pleas judgment for F. Bank and foreclosure January 26, 1938—Second farmer-debtor petition filed, January 28, 1938—Common Pleas order of sale and appraisal, January 31, 1938 — Sale advertisement, February 10, 1938 — Second farmer - debtor proceeding terminated February 24, 1938 — Amended farmer - debtor petition filed March 2, 1938, and administration reference—Restraining order to Common Pleas Court, March 9, 1938—Second farmer-debtor petition dismissed, October 10, 1938—Sale, March 12, 1938—Confirmation of sale, December 17, 1938, Federal jurisdiction of bankruptcies—Section 8, Article I, U. S. Constitution—Federal judicial power where vested—

Section I, Article III, U.S. Constitution—Supremacy of federal law—Section 7, Article XV, Constitution—Article VI, U. S. Constitution.

(No. 32075—Decided March 22, 1950)

Appeal from the Court of Appeals for Mercer county.

Mr. Elmer McClain, for appellant.

Mr. Henry J. Knapke, Mr. Carleton Reiser and Mr. David Armstrong, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C. J. Matthias, Hart, Zimmerman, Stewart, Turner and Taft, J. J. Concur."

The announcement of the denial of the petitioner's motion for an order of the Supreme Court of Ohio to the Court of Appeals of Ohio to certify its record was reported in "Ohio Bar" issue of March 27, 1950 (Volume XXIII, No. 1) on page 4 as follows:

"Motion Docket Decisions

(All are motions to certify records unless otherwise noted)"

"32075. Joseph C. Wenning, Appellant, v. The Peoples Bank Co., et al., Appellees. Mercer County. By appellees to dismiss appeal as of right. Sustained. To certify record. Overruled. 22 Ohio Bar, No. 45 Remedies."

The announcement of the denial of rehearing was reported in the "Ohio Bar" issue of April 17, 1950, (Volume XXIII, No. 4,) on page 54 as follows:

"Rehearings denied"

"32075 Joseph G. Wenning, Appellant, v. The

Peoples Bank of Coldwater et al., Appellees. Mercer County."

In the Court of Appeals of Ohio.

The Opinion of the Court of Appeals of Ohio has not been published. It appears in the record at folio 125 at (R.).

In the Common Pleas Court of Ohio.

The Opinion "(Memorandum)" of the Judge of the Common Pleas Court of Ohio has not been published. It is found in the record at folio 110 at R. .

4. The Applicable Facts and Procedures.

A Very Condensed Summary and Short Statement.

Four distinct cases are involved (1) foreclosure (12534) in the state court; (2) (3) two farmer debtor cases, (11200 and 14344) in the federal court; (4) this case which originated in the state court (13503).

This case stems from the action (13503) in the state court as a collateral attack to set aside a deed and possession under it which were issued and executed in the other action namely the foreclosure case, (12534), in the same state court. The procedures in the preceding case in the state court were interwoven with the two contemporaneous cases (11200 and 14344) in the federal court under Section 75.

The State Court Proceedings (12534) Which Are Here Collaterally Attacked.

and

The Two Contemporaneous Federal Court Proceedings (11200 and 14344).

A more detailed statement of the case, which it is believed contains all that is material to the consideration of the questions presented with detailed references to the record, is contained in the appended Brief under the heading "Statement of the Case" at page 22.

As tersely as can be condensed the history of those two contemporaneous sets of procedures in state and federal courts (12534 in the state court and 11200, and 14344 in the federal court) which took place before this case (13503) was initiated is this:

The foreclosure action (12534) was filed by the Peoples Bank, second mortgage holder, in the state court whereupon the defendant in foreclosure, petitioner here in this case, filed his petition (11200) in the federal court as a farmer debtor under Sec. 75 (a) to (r). While the federal case was pending the state court rendered foreclosure judgment to the Peoples Bank on its second mortgage and issued execution. The federal court proceedings (11200) under Sec. 75 (a) to (r) were completed and the farmer debtor filed his amended petition (also 11200) under the original Sec. 75(s). Thereafter this Court held original 75(s) unconstitutional and the new Sec. 75(s) was then enacted.

In the interval following the enactment of the new Sec. 75 (s) the state court in 12534 issued an order of sale and an appraisement was made under it but the court recalled its order of sale. Then it rendered judgment to the Federal Land Bank on its cross petition as first mortgage holder.

Within two days the farmer debtor filed a second petition (14344) under Sec. 75 (a) to (r) and while it pended

the state court (in 12534) issued a new order of sale under which an appraisement was made and filed. Thereafter the pending proceedings (14344) in the federal court under Sec. 75 (a) to (r) were completed and the farmer debtor filed his amended petition (also in 14344) under the new Sec. 75(s) which was referred to Conciliation Commissioner Rice who issued and served notice of the pendency of the federal case (14344) and a restraining order upon the state court judge, sheriff and attorneys for the Federal Land Bank, the holder of the judgment (in 12534). Notwithstanding the restraining order the sheriff went ahead with a sheriff's sale and reported sale to the Peoples Bank, holder of the second mortgage.

Subsequently the federal court entered an order dismissing the Sec. 75 (s) proceedings (14344) upon motion of the Federal Land Bank and a petition for rehearing was filed. While this petition for rehearing was pending the state court (in 12534) confirmed the sale and issued a writ of possession. Thereafter the federal court (in 14344) denied the petition for rehearing of its order dismissing the Sec. 75 (s) proceeding.

The Collateral Attack in This Case.

(Which originated in the State Court as 13503).

This case collaterally attacks the validity of the actions in the state court in case 12534 which purported to divest the petitioner of his title, to vest it in the mortgagee purchaser and its grantee and to put the grantee in possession. The petitioner initiated his collateral attack upon case 12534 by petition in a new action (13503) in the same state court and it was denied. The Court of Appeals of Ohio affirmed. The Supreme Court of Ohio denied a motion to certify and at the same time dismissed his appeal as of right upon the ground that no debatable constitutional question was involved.

II.

STATEMENT OF THE BASIS OF THE JURISDICTION OF THIS COURT.

The jurisdiction of the Court is conferred by Title 28 USC, Section 1257, particularly paragraph (3).

The petitioner has complied with Title 28 USC, Section 2101 (c).

The judgment of the Supreme Court of the State of Ohio was entered, so as to become final by the overruling of an application for rehearing, on April 12, 1950. On June 17, 1950, which date was within ninety days following the final entry of said judgment, Justice Jackson extended the time for filing this petition for certiorari to and including September 8, 1950, which is less than sixty days extension beyond said ninety days.

III.

THE QUESTIONS PRESENTED.

This petition for Certiorari presents these questions:

1.

Whether a state court may finally determine a federal question in a way conflicting with applicable decisions of this Court.

2.

Specifically whether a state court could render a judgment and decree in foreclosure at any time after the filing of a petition in a federal court under section 75, of the Bankruptcy Act, *i.e.* Title 11 USC, Section 203, and prior to its disposition, no permission to issue such judgment or decree having been granted by the federal court.

3.

Specifically whether an order of sale and appraisement could be issued by a state court at any time after the filing of a petition under Section 75 of the Bankruptcy Act, *i.e.* Title 11 USC, Section 203, in a federal court and prior to its disposition, no permission or authority to issue such order having been granted by the federal court.

4.

Specifically whether a sheriff's sale in foreclosure in a case pending in an Ohio Court, wherein an order of sale is an absolutely essential prerequisite to a sale in foreclosure, could be held and farm land sold, so as to divest the defendant in foreclosure, the owner and mortgagor of the land, of his title when no order of sale was ever issued.

5.

Specifically whether a sheriff's sale in foreclosure in a case pending in an Ohio court could divest the defendant in foreclosure, the owner of the land and its mortgagor, of his title when such sale was held in defiance of a restraining order previously served upon the state judge, the sheriff and the attorneys for the mortgagee judgment holder and creditor by an officer of the United States, namely a conciliation commissioner officially appointed by the federal court and to whom a case pending in a federal court under Sec. 75, 11 USC Section 203(s) involving said land and its owner and mortgagor, had been referred for administration in such pending case prior to the serving of said restraining order, which conciliation commissioner so acted under and exercised an authority of the United States.

6.

Specifically whether proceedings in foreclosure, in execution, or to sell land under a mortgage could be maintained in a case pending in a state court while exclusive jurisdiction over the defendant in said state court case and the land involved therein was in a federal court by virtue of Section 75, Title 11 USC, Section 203.

7.

Whether after the federal court had issued an order dismissing such case pending before it under Sec. 75, Title 11 USC, Section 203, but while a petition for rehearing of the order of dismissal was pending, the state court might validly confirm such purported sale in foreclosure so as to put title in the purported purchaser thereat through the form of executing and delivering a sheriff's deed.

8.

Whether the state court could validly order the sheriff to dispossess said defendant in foreclosure, the owner of said land and its mortgagor, and place in possession thereof the grantee named in said sheriff's deed or place in possession the grantee of said purchaser.

9.

Whether the defendant in said foreclosure action, the mortgagor of the land therein involved, has been divested of title or whether he still has title subject to the mortgages against it and subject to the status of the foreclosure proceedings before the federal court had exclusive jurisdiction.

10.

Whether Article I, Section 8, Fourth Clause, of the Constitution of the United States, and Sec. 75, Title 11 USC, Section 203, deprived the state court of all power to act in

a foreclosure action while the defendant therein and his land were within the exclusive jurisdiction of the federal court.

11.

Whether the judgments of the state courts below violated Article VI, Second Clause, which makes the Constitution and laws passed pursuant thereto the supreme law of the land.

12.

Whether the judgment of the courts below deprived the petitioner of his property without due process of law and of equal protection of the law in violation of the XIV Amendment by denying the force and validity of Sec. 75, Title 11 USC, Section 203, in disregard of the several provisions of the Constitution herein referred to.

13.

Whether a proceeding or action of or in a state court made utterly void and a nullity by laws of the United States as finally adjudicated by the Supreme Court of the United States may have any validity so that through such proceeding or action title may be divested from the owner and vested in another and repose in the latter any title whatsoever.

IV.

REASONS FOR ALLOWANCE OF THE WRIT.

1.

The decision of the courts below are in direct conflict with the decision of this Court in *Kalb* v. *Feuerstein*, 308 US 433, a case which came by appeal from the Supreme

Court of Wisconsin and involved remarkably like procedures in both state and federal courts, even to the initiation of proceedings in the federal courts on October 2, 1934 in each case during the pendency of foreclosure actions in the state courts.

2.

There is involved the important function of this Court to preserve uniformity in the construction of the Constitution and laws of the United States in all of the states and their tribunals. As declared by this Court in *Davis* v. *Packard*, 8 Peters (33 US) 312, 323, there can not be one law for Wisconsin as adjudicated by this Court (*Kalb* v. *Feuerstein*, 308 US 433) and another for Ohio as adjudicated by the courts of Ohio. (*Wenning* v. *Peoples Bank*, 153 OS 583.)

3.

This Court, the supreme judicial authority of the United States, will not permit the courts of the states to impair or fritter away the authority of the United States by contradicting the construction of federal statutes adjudicated by it. *Missouri* v. *Andriano*, 138 US 496.

4.

This Court has declared that it has an obligation to exercise its judicial power to maintain the supremacy of the Constitution and laws of the United States and of the federal government. *Harkrader* v. *Wadley*, 172 US 148, 162; *Ableman* v. *Booth*, 21 Howard (62 US) 506; In the Matter of *Heff*, 197 US 488, 505; *Greene* v. *Neal*, 6 *Peters*, (31 US) 291, 298.

5.

It is a matter of the greatest public interest whether state courts, judges, officials and litigants shall be permitted to flout the authority of the Constitution of the

United States, the legislation of the Congress of the United States, and the most positive declarations of this Court as announced in *Kalb* v. *Feuerstein*, 308 US 433, wherein no less than sixteen times its unanimous decision declared, in a case squarely based upon procedures remarkably like this *Wenning* case, that:

(Pages 438-439) "It is generally true that a judgment by a court of competent jurisdiction bears a presumption of regularity and is not thereafter subject to collateral attack. But Congress, because its power over the subject of bankruptcy is plenary, may by specific bankruptcy legislation create an exception to that principle and render judicial acts taken with respect to the person or property of a debtor whom the bankruptcy law protects nullities and vulnerable collaterally. Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack."

(Page 443) "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that

State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law."

6.

By persistence in following through the state court procedure pursuant to the normally applicable statutes of the State of Ohio in the foreclosure case in utter disregard of the United States Constitution, Sec. 75, 11 USC, Sec. 203, and the many decisions of this Court and of the United States Court of Appeals for the Sixth Circuit, which includes Ohio, the state court deprived the petitioner of his property, literally so because the sheriff under an order of the court forceably removed the petitioner from his farm and home, without due process of law.

The petitioner by his collateral attack directly challenges all of the acts of the state court, its agents and the litigants in the foreclosure case which were in defiance of the Constitution of the United States, the laws of the United States passed in pursuance thereof and the decisions of this Court.

7.

The decisions of the state courts below out of which this petition for certiorari arises would, if permitted to stand without rectification by this Court, deprive the petitioner without due process of law of his property by upholding and sustaining utterly void processes in the form of law to destroy his title and forcibly evict him from his land.

8.

The validity of statutes of the United States was repeatedly drawn in question in each of the three state courts below by the objections specifically elaborated by the pe-

titioner setting out that in the foreclosure action when the state court and its officers, agents and litigants repeatedly and defiantly disregarded, as if nonexistent, the provisions of Sec. 75, Title 11 USC, Section 203, by entering judgment to the Peoples Bank, issuing execution thereon, issuing order of sale and appraisement 328, insisting upon and conducting a sheriff's sale and purporting to sell the petitioner's land, confirming said sale and executing and delivering a deed based thereon and finally evicting the petitioner and putting the pseudo purchaser, or its grantee, in possession, all in direct defiance of the provisions of said statutes and in defiance of a restraining order issued by an officer of the court acting under authority of the United States.

9.

The validity of statutes of the State of Ohio, namely General Code Section 11588, 11688 and 11690, which normally prescribe the course of procedures in actions to foreclose a mortgage on real estate, are directly drawn in question on the ground of their being repugnant to the Constitution and statutes of the United States, namely Article I, Section 8, Fourth Clause, which grants power to the Congress of the United States to legislate upon the subject of bankruptcies, Article VI which makes laws enacted pursuant thereto the supreme law of the land, above state laws, judges and officials, requiring each judge and officer to make oaths to support said Constitution.

10.

The petitioner claims title and right to his real estate and claims immunity from foreclosure proceedings conducted in defiance of the Constitution and laws of the United States, and he specially set up and claimed the same under the Constitution and statutes and authority of the United States.

Your petitioner accordingly prays that a Writ of Certiorari be issued to the Supreme Court of the State of Ohio directing it to certify to this Court a transcript of the record and proceedings therein for the final determination of this Court and for all proper relief.

Respectfully submitted,

ELMER MCCLAIN,
Lima, Ohio,
Counsel for Petitioner,
Joseph G. Wenning.

Lima, Ohio
August 22, 1950.

BRIEF

In Support of the Foregoing Petition for Writ of Certiorari.

I.

Report of the Decision Below.

In the Supreme Court of Ohio.

No opinion was rendered. The memorandum of denial of motion to certify and dismissal of appeal as of right on the ground that no constitutional question is involved is reported in the June 5, 1950 issue of the "Ohio Bar" (Volume XXIII, No. 11) as *Wenning* v. *Peoples Bank*, 154 OS 583. This report and the other extracts from the Ohio Bar pertaining to this case in that court are fully set forth at page 7 of the preceeding Petition for Certiorari. They are also found in the Record at folio 137, R. .

In the Court of Appeals of Ohio.

The Opinion of the Court of Appeals of Ohio has not been published. It appears in the record as folio 125 at R. .

In the Common Pleas Court of Ohio.

The Opinion ("Memorandum") of the Judge of the Common Pleas Court of Ohio has not been published. It is found in the record as folio 110 at R. .

II.

Grounds Upon Which the Jurisdiction of This Court Is Invoked.

The basis for the Jurisdiction of this Court has been set forth at page 12 in the Petition for Writ of Certiorari which precedes this brief under the heading "Statement of the Basis of the Jurisdiction of this Court".

III.

STATEMENT OF THE CASE.

This is the more full statement of the case referred to in the proceding petition at page 9 at the heading "The Applicable Facts and Procedures".

For ready reference and to facilitate understanding the corelation of proceedings in state and federal courts they are put into two columns.

Pertinent Proceedings in the State Court Foreclosure Case 12534 and in the Federal Court Farmer Debtor Cases 11200 and 14344.

STATE COURT	FEDERAL COURT
1934	
Case 12534	Case 11200
September 7, 1934. Petition in foreclosure filed by Peoples Bank, holder of second mortgage. Ex. 1, folio 1, R.	
	October 2, 1934. Petition 75 filed in federal court, approved and referred. Ex. 2, folio 47, R. .....; 6A, folio 54, R. .....; 6C, folio 56, R. .....; 7, folio 57, R. .....
October 16, 1934. Judgment and decree of foreclosure to Peoples Bank. Ex. 9, folio 6, R.	
1935	
	January 2, 1935. Farmer debtor proceedings under Sec. 75 (a) to (r) completed. Ex. 2, folio 47, R. .....
January 24, 1935. Execution 4384 issued on Judgment to Peoples Bank. Ex. 10, folio 61, R. ..... Ex. 1, folio 1, R.	

February 21, 1935. Amended Petition under original Sec. 75 (s) filed, adjudication and reference to conciliation commissioner. Ex. 2, folio 47, R. .....

March 28, 1935. Execution 4384 returned without action. Ex. 1, folio 1, R. .....

May 27, 1935. (Original Sec. 75 (s) held unconstitutional. *Louisville* v. *Radford*, 295 US 555.)

August 6, 1935. Upon application of farmer debtor case under original Sec. 75(s) dismissed. Ex. 2, folio 47, R. .....

August 28, 1935. (New. Sec. 75(s) passed. Title 11 USC, Sec. 203.)

1936

April 25, 1936. Order of sale 289 issued. Ex. 1, folio 1, R. .....

June 5, 1936. Appraisement filed. Order of sale 289 returned unexecuted by order of court. Ex. 1, folio 1, R. .....

1937

October 18, 1937. Motion of Farmer debtor to reinstate case 11200 denied. Ex. 2, folio 47, R.....

1938 Case 14344

January 26, 1938. Judgment and decree of foreclosure to Federal Land Bank. Ex. A, folio 101, R. .....

January 28, 1938. A second petition 75 filed, approved and referred to conciliation commissioner Rice. Ex. 3, folio 49 R. .....; 12A, folio 63, R. .....; 12C, folio 65, R. .....

January 31, 1938. Order of sale 328. Ex. 1, folio 1, R. .....

February 8, 1938. Appraisement filed. Ex. 1, folio 1, R. .....

February 19, 1938. Motion of Federal Land Bank to dismiss heard and denied by conciliation commissioner.

February 24, 1938. Certificate of completion of proceedings under Sec. 75 (a) to (r). Ex. 3, folio 49, R. .....

March 2, 1938. Amended petition 75(s) filed; adjudication and order of reference to conciliation commissioner Rice. Ex. 17, folio 71, R. .....; 18, folio 73, R. .....; 19, folio 74, R. .....

March 3, 1938. Motion by Federal Land Bank to dismiss case filed in federal court. Ex. 3, folio 49, R. .....

March 7, 1938)
March 9, 1938)—Service of notice and restraining order by conciliation commissioner Rice in state court case 12534 upon state court judge, sheriff and attorneys for Federal Land Bank. Ex. 20, 21, folio 76, 79, R. .....

March 7, 1938)
March 9, 1938)—Service of restraining order by conciliation commissioner Rice in state court case 12534 upon state court judge, sheriff and attorneys for Federal Land Bank. Ex. 20, 21, folio 76, 79, R. .....

March 12, 1938)
March 14, 1938)—Sheriff's sale and report of sale to People Bank (John Weigle, Cashier) Ex. 1, folio 1, R. ..... Ex. 16, folio 69, R. .....

October 10, 1938. Order of federal court dismissing case 14344 under Sec. 75(s) Ex. C, folio ---, R. .....

November 16, 1938. Petition for rehearing. Ex. 3, folio 49, R. .....

December 17, 1938. Sale confirmed. Sheriff's deed delivered. Ex. 22, 23, folio 82, 84, R. .....

December 29, 1938. Writ of possession issued by order of judge to sheriff and executed. Ex. 1, folio 1, R. ..... Ex. 24, folio 87, R. .....

1939

January 11, 1939. Petition for rehearing denied. Ex. 3, folio 49, R. .....

March 8, 1939. Execution of writ of possession reported. Ex. 24, folio 87, R. .....

IV.

Specification of Errors.

1.

The Supreme Court of Ohio erred in refusing to hear and determine the decree and judgment of the Court of Appeals of Ohio by dismissing petitioner's appeal as of right and overruling his motion for an order to the Court of Appeals of Mercer County, Ohio to certify its record up for review.

2.

The courts below erred in disregarding and violating the mandatory provisions of Sec. 75, (Title 11 USC, section 203), particularly Section 75 (n)(o) and (p) [subsection 203(n), subsection 203 (o) and subsection 203 (p)] which ousted the state court and all its agents of all jurisdiction and power to act in relation to the real estate involved in the foreclosure action in case number 12534 in the Common Pleas Court of Mercer County, Ohio, while the petitioner had a case pending in the United States Court under said Section 75 (Title 11 USC, section 203). *Kalb* v. *Feuerstein*, 308 US 433.

They should have held that all proceedings and actions in the said foreclosure case number 12534 in the common pleas court taken and performed while appellant, the owner of the real estate involved, had a case filed in the United States Court under said United States statute were nullities wholly void and ineffective, but their decisions were

against the validity of said statutes of the United States and in favor of the validity of the statutes of the state, namely, General Code, sections 11588, 11688 and 11690, and other sections of the General Code of Ohio.

3.

The courts below erred in refusing to be bound by Article I, Section 8, Fourth Clause, of the Constitution of the United States investing the Congress with power to establish laws on the subject of bankruptcies throughout the United States.

They should have enforced the United States statute, namely Section 75 (Title 11 USC, section 203), a law established pursuant to said constitutional provision, by restoring title to the appellant as it existed prior to the void proceedings and actions in the Common Pleas Court in said foreclosure action 12534, but they decided in favor of the validity of state statutes which provided for such proceedings and actions and against the validity of the United States statute.

4.

The courts below erred in disregarding Article VI, Second and Third Clauses, of the Constitution of the United States which provides that the laws of the United States are the supreme law of the land, making the constitutional enactment of any United States statute the supreme law over every constitutional and statutory provision of any state and over the procedures followed by any court of a state, and they so erred in disregarding the oath which is required of all judicial officers of the state to be bound by the Constitution of the United States.

The courts below should have adjudged the proceedings and actions of the common pleas court and its agent in

the foreclosure case 12534 to be absolute nullities incapable of having any effect because such proceedings and actions occurred while the petitioner had a case pending under said United States statutes, namely Section 75 (Title 11 USC, section 203), in the United States Court, but they decided in favor of the validity of said state statutes which provided for such proceedings and actions and against the validity of said United States statutes.

5.

The judgments of the courts below deprived the petitioner of his property without due process of law and of equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States by denying the force and validity of Section 75 Title 11 USC, section 203) in disregard of the several provisions of the Constitution of the United States herein referred to.

Said judgments should have held that said United States statutes made absolutely void and absolute nullities and of no effect, all proceedings in the Common Pleas Court of the State of Ohio in the said foreclosure action against the petitioner in case number 12534 in that court which occurred while he had filed in the United States Court his case under said United States statute. *Kalb* v. *Feuerstein*, 308 US 433.

6.

The courts below erred in giving and adjudging effect and validity to the state common pleas court proceedings and actions which occurred in said foreclosure case number 12534 while the petitioner, then defendant in said foreclosure case, had a petition filed in the United States Court under Section 75 (Title 11 USC, section 203) involving the same real estate as that involved in said foreclosure action, which proceedings and actions in said common pleas court were rendered absolutely void and utter nullities by

subsections 75 (n), (o) and (p) [subsections 203 (n), (o) and (p)] of said statute of the United States, fully adjudicated to be so by this Court in a case on all fours, namely, *Kalb* v. *Feuerstein*, 308 US 433.

Specifically, the proceedings in said common pleas court in said foreclosure action which were utterly void and ineffective were:

1. Personal judgment and decree in foreclosure entered in form against the petitioner fourteen days after he had filed his petition in the United States Court under Section 75 (Title 11 USC, section 203), without any permission ever being sought or granted pursuant to said statute whereby said foreclosure decree and personal judgment might have been lawfully entered.

2. Thereafter while said petition was still pending in the United States Court and without any permission or authority being sought or granted to enforce said decree in foreclosure and personal judgment and execution in form was issued to enforce said decree and judgment.

3. Thereafter an order of sale was issued and returned by order of court.

4. Thereafter an order of sale and order of appraisement in form was issued and a form of appraisement returned in said Court while a petition by petitioner was filed in said United States Court, without any permission or authority having been sought or granted.

5. Thereafter without any permission or authority being sought or granted and while a petition under Section 75 (Title 11 USC section 203), was filed in the United States Court and in disobedience and in defiance of a restraining order issued out of the said United States Court and served upon the judge and sheriff of said common

pleas court in said foreclosure case 12534 and upon the attorneys for a judgment creditor therein a form of sheriff's sale was conducted by the sheriff and report of sale made by him to the Court.

6. Thereafter the judge of said common pleas court in said foreclosure action 12534 purported to confirm said sale to the agent of the respondent Peoples Bank.

7. Thereafter upon a form of order of writ of possession issued by the judge of said common pleas court, in said foreclosure action the sheriff unlawfully removed the appellant, his family, his household goods and his other chattels from the farm residence and from the said farm of the petitioner, the defendant in said foreclosure case number 12534, which farm was the real estate involved in said foreclosure action.

7.

The courts below erred in holding, against the validity of Section 75 (Title 11 USC, section 203) and in favor of the validity of the said statutes of the State of Ohio, that the said common pleas court could by its order, entered after power had been restored to it, give force and effect to the prior void proceedings and actions therein which were rendered absolute nullities and wholly ineffective by said United States statutes and by said United States Constitutional provisions, namely, Article I, Section 8, Fourth Clause; Article VI, Second and Third Clauses; and the Fourteenth Amendment, and thereby deprived the petitioner Joseph G. Wenning of his property without due process of law, and of the equal protection of the laws.

8.

The courts below denied the title, right and immunity specially set up and claimed by the petitioner under the Constitution and statutes of the United States.

9.

The courts below denied the right, privileges and immunity specially set up and claimed by the petitioner under an authority of the United States exercised by an officer of the United States namely conciliation commissioner Rice.

10.

The courts below decided a federal question not in accord with applicable decisions of this Court.

11.

The courts below erred in giving validity to the acts of an agent or officer of the state court, namely the sheriff, which acts were by said courts presumed to be authorized and validated by the laws of the State of Ohio despite their repugnancy to the Constitution and laws of the United States specially set up and claimed by the petitioner.

V.

SUMMARY OF THE ARGUMENT.

A Statement of the Plan and Purpose of this Brief.

It is limited to support of the petition by showing why this Court should grant certiorari.

1.

Summary of Point One

("Reason" No. 1 in the Petition.)

In this collateral attack upon the acts and proceedings of the state court in foreclosure case 12534 the state courts below decided a federal question in direct conflict with decisions of this Court, particularly *Kalb* v. *Feuerstein*, 308 US 433, which also was a collateral attack upon the acts and proceedings of a state court in a setting remarkably like this *Wenning* case.

2.

Summary of Point Two

("Reasons" 2, 3 and 4 in the Petition)

It is the highest function of this Court to preserve the integrity and unity of the United States in its unique dual character of one state binding together many states.

Preservation of uniformity of construction of constitution and laws and their supremacy and the supremacy of the United States under the Constitution is the duty of this Court.

3.

Summary of Point Three

("Reason" No. 5 in the Petition)

The great public interest involved in the case here presented.

4.

Summary of Point Four

("Reasons" 6 and 7 in the Petition)

The petitioner was deprived of his property without due process of law by the proceedings in the foreclosure case and by the courts below in sustaining those proceedings.

5.

Summary of Point Five

("Reasons" 8 and 9 of the Petition)

The validity of United States laws and the validity of state laws, as repugnant to the Constitution and laws of the United States were drawn in question.

6.

Summary of Point Six

("Reason" No. 10 in the Petition)

The petitioner specially set up his claim of constitutional immunity from foreclosure and his right, title and privilege to have his land freed from the void but entangling procedures of the foreclosure action.

VI.

ARGUMENT.

Plan and Purpose of This Brief.

It is conceived that it is the function of a brief in support of a petition for certiorari to present arguments to show the special and important reasons why this Court ought to review the case presented.

This brief will therefore be confined within such limits without arguing the merits of the case except where they fall within these limits.

1.

Argument of Point One.

("Reason" No. 1 in the Petition)

That The Decisions Below Directly Conflict With Kalb v. Feuerstein, 308 US 433.

This *Wenning* case is a collateral attack, originating in the state court, (folio 7, R.) upon other proceedings in that court in foreclosure case 12534 (Ex. 1, folio 1, R.) which progressed into the State Supreme Court of Ohio and is the subject of this petition.

Likewise *Kalb* v. *Feuerstein,* 308 US 433 was a collateral attack, originating in a state court, upon state court foreclosure proceedings in another case which progressed into the State Supreme Court of Wisconsin and came on appeal to this Court.

In the *Wenning* case the foreclosure action was pending in the Ohio Court (Ex. 1, folio 1, R.) when on October 2, 1934, Mr. Wenning filed his petition under Sec. 75 (Ex. 1, folio 1, R.) as a farmer debtor in the United States Court. Thereafter in the state court, notwithstanding the self executing exclusive jurisdiction of the federal court [(Sec. 75 (n) and (p)] and the mandatory prohibitions against the state court [Sec. 75 (o)], the judge and sheriff proceeded with judgment of foreclosure on through to sale and report of sale Ex. 1, folio 1 R.). The sale proceedings were also in violation of a restraining order issued out of the federal court. Ex. 20, 21, folio 76, 79. R. ..... which was a collateral action, that came to this court on appeal.

In the *Kalb* case which was a collateral action, that came to this court on appeal, foreclosure had been pending in a Wisconsin court in a prior case and had progressed to judgment of foreclosure when on October 2, 1934 (the same date the Wenning farmer debtor petition was filed) Mr. Kalb filed his farmer debtor petition in the federal court. Thereafter the state court, nothwithstanding the same self executing and mandatory provisions of the same federal statute [(Section 75 (n) (o) and (p)] the judge and sheriff proceeded with sale in foreclosure, confirmation of sale and writ of assistance executed by evicting the farmer debtor and putting the mortgagee purchaser in possession.

Eight years of litigation, initiated by the collateral action, ensued before Mr. Kalb was restored to possession. Mr. Wenning is still out of possession.

[The likenesses of the two cases extends even to the attitude of the judge in each of the foreclosing courts. In

the *Kalb* case it is a matter of record that the Wisconsin judge—even after the unanimous decision of this court in *Kalb* v. *Feuerstein*, 308 US 433—testified that he had given the matter a week of hard study and still believed he was right and this Court was wrong. In the *Wenning* case, it is a matter of common knowledge and known to all counsel, stated in open court and not denied, that the Ohio judge said (politely transliterating) that no federal court could deprive his court of its previously asquired jurisdiction.]

No stay of foreclosure or of subsequent action to enforce it was ever sought or granted under sec. 75 (o) in either case. (For the *Wenning* case see certificate of clerk of federal court Ex. 11, folio 62, R.) and Ex. 15, folio 68, R.). However, as has been said, in the Wenning second farmer debtor case 14344 while it was under Sec. 75(s), controlled also by Sec. 75(n) and (p), the conciliation commissioner issued and served upon the judge, sheriff and counsel for litigants a restraining order prohibiting state court proceedings. Ex. 20, 21. (One document ending with certificate of the clerk of the federal court) folio 79, 82 R.).

In addition, in the *Wenning* case the sheriff and the immediate grantee of the purchaser at the sheriff's sale, who (not the purchaser) was put into possession when Mr. Wenning was evicted, were notified and warned by the petitioner through his counsel by letters that title still vested in Mr. Wenning who would insist upon his rights. Letters of January 12, 14, and 31 and February 3, 1939. Exhibits 25A, B, C, 26, folio 88, 89, R.). Also the testimony of the sheriff (R. .....) and of Respondent Plieman. R. .....

With the foregoing parallel case histories it suffices to refer to the unanimous opinion of this Court (by Justice Black) in *Kalb* v. *Feuerstein*, 308 US 433.

Page 436: "The questions in both No. 120 and No. 121 are whether the Wisconsin County Court had jurisdiction, while the petition under the Frazier-Lemke Act was pending in the bankruptcy court, to confirm the sheriff's sale and order appellants dispossessed, and, if it did not, whether its action in the absence of direct appeal is subject to collateral attack."

Page 438: After stating the position of the Wisconsin State court,

"But if appellants are right in their contention that the Federal Act of itself, from the moment the petition was filed and so long as it remained pending, operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the State court so as to stay its power to proceed with foreclosure, to confirm a sale, and to issue an order ejecting appellants from their farm, the action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack. And the determination whether the Act did so operate is a construction of that Act and a Federal question."

Page 439: . . . "Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities subject to collateral attack. The States cannot, in the exercise of control over local laws and practice, vest State courts with power to violate the supreme law of the land. The Constitution grants Congress exclusive power to regulate bankruptcy and under this power Congress can limit the jurisdiction which courts, State or Federal, can exercise over the person and property of a debtor who duly invokes the bankruptcy law. If Congress

has vested in the bankruptcy courts exclusive jurisdiction over farmer-debtors and their property, and has by its Act withdrawn from all other courts all power under any circumstances to maintain and enforce foreclosure proceedings against them, its Act is the supreme law of the land which all courts—State and Federal—must observe. The wisdom and desirability of an automatic statutory ouster of jurisdiction of all except bankruptcy courts over farmer-debtors and their property were considerations for Congress alone.

We think the language and broad policy of the Frazier-Lemke Act conclusively demonstrate that Congress intended to, and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court in which the farmer's petition was then pending."

The opinion then quotes Section 75 (n) (o) and (p).

Page 441: "Thus Congress repeatedly stated its unequivocal purpose to prohibit—in the absence of consent by the bankruptcy court in which a distressed farmer has a pending petition—a mortgagee or any court from instituting, or maintaining if already instituted, any proceedings against the farmer to sell under mortgage foreclosure, to confirm such a sale, or to dispossess under it.

This congressional purpose is more apparent in the light of the Frazier-Lemke Act's legislative history. Clarifying and altering the sweeping provisions for exclusive Federal jurisdiction in the original Act, Congress made several important changes in 1935. It was then that subsection (p) was amended so that the prohibitions in subsection (o) of any steps against a farmer-debtor or his property once his petition is filed were made specifically applicable 'to all judicial or official proceedings in any court or under the direction of any official, and . . . to all creditors, public or

private, and to all of the debtor's property, wherever located. All such property shall be under the sole jurisdiction and control of the court in bankruptcy, and subject to the payment of the debtor farmer's creditors, as provided for in Section 75 . . .' "

Page 443: . . . "In harmony with the general plan of giving the farmer an opportunity for rehabilitation, he was relieved—after filing a petition for composition and extension—of the necessity of litigation elsewhere and its consequent expense. This was accomplished by granting the bankruptcy court exclusive jurisdiction of the petitioning farmer and all his property with complete and self-executing statutory exclusion of all other courts.

The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, the Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions—were all without authority of law."

Page 444: "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor. The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Because of the fact that the judgment to the Federal Land Bank (Ex. A, folio 101, R.) was entered when no federal case was pending, and was therefore valid, and two days later while the second farmer debtor case 14344 was filed in the federal court (Ex. 3, folio 49 R. Ex. 12A, folio 63 (R. Ex. 12C, folio 65 R.) and invalidated the order of sale 328 issued three days thereafter (Ex. 1, folio 1, R. Ex. 16 folio 69, R. , it is important to know whether in Ohio foreclosures a sheriff's sale is absolutely necessary to cut off title and vest it in another. The following is quoted:

From General Code of Ohio, Section 11588:

> "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered."

27 Ohio Jurisprudence, "Mortgages" section 522, page 696:

> "A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. By the express command of the Code, when a mortgage is foreclosed a sale of property shall be ordered;" General Code of Ohio, section 11,588.

24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17:

> "A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act. Furthermore, purchasers at a judicial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but the order must be made prior to the sale."

2.

Argument of Point Two.

("Reasons" 2, 3 and 4 in the Petition)

To Preserve Uniformity in Construction of the Constitution and Laws of the United States.

As Supreme Judicial Authority This Court Will Not Permit State Courts to Impair United States Authority.

The Supremacy of the Constitution and Laws of the United States and of the United States Must be Maintained.

Can it be questioned that the highest (the only?) function of the Supreme Court of the United States is to preserve the integrity, the single wholeness, of the UNITED STATES in its dual form of one big sovereign state binding together many smaller sovereign states which have granted only particularly specified portions of their sovereignty to the United States?

It must preserve the uniformity of construction of the Constitution and laws of the United States in all of the states. *David* v. *Packard,* 8 *Peters* (33 US) 312, 323. Which construction of Section 75 (Title 11 USC, sec. 203) shall be followed? That of this Court in *Kalb* v. *Feuerstein,* 308 US 433, or that of the State of Ohio in *Wenning* v. *Peoples Bank,* 154 OS 583, in refusing to review the decisions of the lower Ohio courts which flatly disagree with this Court's construction.

The nub of it all is illustrated by the following from the "Memorandum" of the common pleas court (folio 110, R.) (sixth paragraph):

(folio 111). "If any of said ministerial acts validly ordered by the Court were irregular or void, do not the Ohio Statutory provisions which provide for the procedure provide that it is the Court of this state which shall make the determination as to the validity of those acts? Certainly the Common Pleas Court on December 17, 1938, had both the jurisdiction and the power to make the determination made and if the Court did commit error the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error."

And from the Opinion of the Court of Appeals (folio 125, R.) (near the end of the opinion):

(folio 128). "The appraisal, advertising for sale, and sale, of the real estate by the sheriff were not judicial acts, but merely ministerial acts, the performance of which was not inhibited, prohibited or precluded in any way by reason of the filing by plaintiff, of a new farmer-debtor petition on January 28, 1938. Said acts were therefore performed in due course of law.

The appraisal, advertising for sale, and sale, of said real estate by the sheriff, not being judicial acts but merely ministerial acts, the Common Pleas Court, on December 17, 1938, being then free to fully exercise its jurisdiction in said foreclosure proceeding, had jurisdiction and power to render judgment confirming said sale, and its judgment may not be set aside in this action.

Furthermore, if said acts of the sheriff in the respects mentioned had been wholly void, the action of the court in confirming said sale was within its jurisdiction and power, and was not void but merely voidable, and subject to attack only through error proceedings prosecuted from said judgment, and not by separate action such as the plaintiff seeks to maintain."

Set against these opinions is that of this Court in *Kalb v. Feuerstein*, 308 US 433, at page 443 that:

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court, and Walworth County Court that attempted to grant the mortgagees relief, the sheriff who enforced the court's judgment, were all acting in violation of the controlling Act of Congress. Because that State had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property to the extent based upon the court's actions—were all without authority of law."

And at page 444:

> "Congress manifested its intention that the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer-debtor" . . . "and considerations as to whether the issue of jurisdiction was actually contested in the County court, or whether it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

There is an *implied intimation* in the Ohio Court of Appeals opinion, in the first of the three paragraphs quoted above (beginning at folio 128), that the acts of the sheriff in the foreclosure action could not be "inhibited, prohibited, or precluded" by a "new farmer-debtor petition." Was it meant that after one farmer debtor petition was filed a second one would be without any effect? This court decided in *Wragg v. Federal*, 317 US 325, this court, in its unanimous opinion by Chief Justice Stone, at page 328, that

> "We find no intimation in the language and purpose of the Act that an unsuccessful earlier proceeding

would preclude a new petition so long as the farmer retains an interest which could be administered in a proceeding under section 75."

The filing of a second petition in a section 75 proceeding has uniformly been sustained in the lower courts, for instance, *Feuerstein* v. *Kalb*, 127 F2 509 (CCA7); *Layton* v. *Thayne*, 133 F2 287 (CCA10); *Re Boyer*, 138 F2 349 (CCA8), as it has been in regular bankruptcy.

Nor will this Court permit the states to fritter away the authority of the United States by contradicting this Court's construction of its Constitution and laws. *Missouri* v. *Andriano*, 138 US 496.

Many times this Court has asserted its obligation to maintain the supremacy of the Constitution and laws of the United States. For example: *Harkrader* v. *Wadley*, 172 US 148, 162; *Ableman* v. *Booth*, 21 *Howard* (62 US) 506; *In the Matter of Heff*, 197 US 488, 505; *Green* v. *Neal*, 6 Peters, (31 US) 291, 298.

3.

Argument of Point Three.

("Reason" No. 5 in the Petition)

That The Petition For Certiorari Presents A Case of Great Public Interest.

It is of the greatest interest to the public that a state shall not digress from that uniformity of construction and observance of federal law that is the cement binding forty-eight sovereign states into one coherent government in the respects ceded by them to that government for the benefit of all.

Europe's glaring example of the people of a continent rent by international conflicts since the beginning of recorded history at the least, is the inevitable denouement of entering wedges just such as *Wenning* v. *Peoples Bank*, 153 OS 583, to which this petition for certiorari is directed.

4.

Argument of Point Four.

("Reasons" 6 and 7 in the Petition)

The Foreclosure Proceedings Deprived Petitioner Of His Property Without Due Process of Law.

The Courts Below In The Collateral Attack Case Also Deprived The Petitioner Of This Property Without Due Process Of Law.

The persistent following through of state foreclosure procedure, in defiance not only of self executing mandatory federal statutes but also of peremptory restraining orders, which is collaterally attacked in this case, and the decisions of the court below if not rectified by this court, effectually deprive the petitioner of his property without due process of law.

Three Constitutional provisions were defied, the Fourteenth Amendment which guarantees to the citizen of every state due process of law and equal protection of the laws, Article I which grants exclusive power to the United States in the subject of bankruptcies, and Article VI which makes the Constitution and laws passed pursuant to it the supreme law.

5.

Argument of Point Five.

("Reasons" 8 and 9 of the Petition)

The Validity Of Federal Law Is Drawn In Question.

The Validity Of State Laws As Repugnant To The Constitution And Laws Of The United States Is Drawn In Question.

The drawing in question of section 75 (Title 11 USC, sec. 203) is quite clear. The opinions of the two lower courts, which the State Supreme Court declined to review, expressly held that the federal law was of no effect.

The petitioner directly draws in question the repugnancy of the state foreclosure statutes to the United States Constitution and statutes as applied to the foreclosure action during the times when the federal court had exclusive jurisdiction and the state court was devoid of all power.

6.

Argument of Point Six.

("Reason" No. 10 in the Petition)

The Right, Title, Privilege And Immunity of the Plaintiff.

The petitioner has especially set up, his claim of immunity from foreclosure under the Constitution and laws of the United States and, also his right, title, and privilege to his land free from all void but entangling procedures of the state court in the foreclosure action.

He seeks the benefits of the laws of his state for redemption of his farm real estate by restoration of the foreclosure case to the status it had before the breaches of federal authority occurred.

CONCLUSION.

The writ should be granted because there is involved a state court decision which directly countenanced decisions contradictory to a decision of this Court; uniformity of construction and supremacy of the laws of the United States and decisions of this Court are involved; the questions involved are matters of great public interest; the petitioner has been deprived of his property without due process of law; the validity of federal law and of state laws, as repugnant to the Constitution and federal laws, have been drawn in question; and the petitioner, despite his claim of immunity, right, title and privilege specially set up by him, has been deprived of his property without due process of law and the equal protection of the law.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for Petitioner

Lima, Ohio
August 26, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING, *Petitioner*,

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

BRIEF FOR RESPONDENTS THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL AND JOSEPH PLEIMAN IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Ohio (R. 137, 138), has not been published but may be found in Vol. XXIII, No. 11, of the "Ohio Bar" as 153 OS 583. The opinion of the Court of Appeals, Third Appellant Judicial District of Chio (R. 125-129) has not been published. The

opinion of the Judge of the Common Pleas Court of Mercer County, Ohio (R. 110-113) has not been published.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C., 1257 (3).

QUESTIONS PRESENTED.

1. Whether in a suit validly instituted, a state court judgment of foreclosure (January 26, 1938) and an order of confirmation of sale December 17, 1938) at a time when no federal case was pending by farmer-debtor under Section 75 of the Bankruptcy Act (11 U.S.C. 203), are void.

2. As a corollary thereof, whether after a federal court dismisses petition of a farmer-debtor under Section 75 of the Bankruptcy Act, setting aside and holding for naught all stay orders theretofore entered therein, a motion for rehearing filed 36 days later (November 16, 1938) and summarily denied on January 11, 1939, could, *ipso facto*, revive the dismissed federal case; supersede that court's order of dismissal, and operate to oust the state court of authority to confirm on December 17, 1939 sale under foreclosure and to order dispossession of farmer on February 24, 1939.

3. Whether petitioner, who appeared, through counsel, in foreclosure proceedings and contested state court's jurisdiction; moved in state court for recall of writ of possession; moved for a new trial and rehearing in the state court; failed to appeal from any state court order in the foreclosure proceedings; failed to appeal from order dismissing federal court petition brought by him under Section 75 of the Bankruptcy Act and involving indebtedness which was the subject of the state foreclosure proceedings, is bound under the principles of *res judicata* and is estopped collaterally from attacking at a late date, judgment of foreclosure; the confirmation of sale; deed to purchaser, and dispossession under authority of state court proceedings.

STATUTES INVOLVED.

The petitioner has claimed that the proceedings below were in contravention of the provisions of 11 U.S.C. 203, as enacted in 1933[1] and as amended in 1934[2] and in 1935.[3] There are also involved, as will be hereinafter shown, sections 11588, 11688 and 11690 of the General Code of Ohio, which may be found in Volume 4 Throckmorton's Ohio Code Annotated (1948 Revision) at pages 460, 488 and 499, respectively.

STATEMENT.

September 7, 1934, respondent The Peoples Bank Company of Coldwater, Ohio, as the holder of note secured by second mortgage on the property involved here, instituted suit in foreclosure against petitioner and others in the Common Pleas Court of Mercer County, Ohio. Federal Land Bank of Louisville, Kentucky, holder of the first mortgage on the property, was one of the parties defendant (R. 1).

October 16, 1934, the Common Pleas Court of Mercer County, Ohio, issued judgment and decree of foreclosure to respondent Peoples Bank (R. 58-60).

January 24, 1935, execution was issued on that judgment (R. 61). Execution was returned March 28, 1935, on such judgment, without action (R. 2); April 25, 1936, order of sale issued (R. 2) and on June 5, 1936, appraisement filed and the order of sale returned unexecuted by order of court (R. 2).

October 2, 1934, petition under section 75 of the Bankruptcy Act (11 U. S. C. 203) was filed by petitioner in the then District Court of the United States for the Northern District of Ohio. Those proceedings, outlined on pages 23

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[1] Act of March 3, 1933, chap. 204, 47 Stat. at L. 1467, 1470, 11 USCA § 203.

[2] Subsection (s) was added to § 75 by the Act of June 28, 1934, chap. 869, 48 Stat. at L. 1289.

[3] Act of August 28, 1935, chap. 792, 49 Stat. at L. 942.

and 24 of the petitioner's brief, culminated in a voluntary dismissal of the federal case on August 6, 1935 (R. 47, 48) and a motion to reinstate was denied on October 18, 1937 (R. 48).

On January 26, 1938, at a time when admittedly no federal case was pending, the Common Pleas Court of Mercer County, Ohio, rendered a judgment and decree of foreclosure to Federal Land Bank of Louisville, Kentucky, pursuant to its answer and cross petition in the suit instituted by respondent Peoples Bank, and ordered sale and appraisement (R. 101-103). Two days later, on January 28, 1938, petitioner filed in the above mentioned federal court a second petition under Section 75 of the Bankruptcy Act (R. 49). Such petition in the federal court was pending from January 28, 1938, until October 10, 1938, during which time the sheriff appraised, advertised and sold the farm (R. 69, 70A), which were ministerial acts (R. 111, 128), but the Common Pleas Court of Mercer County, Ohio, made no order or decree with reference thereto nor did it approve or confirm the sale (R. 3, 110-113, 127).

October 10, 1938, the petitioner's second federal court case was dismissed (R. 104-105), the order providing that all stay orders theretofore entered thereunder be set aside and held for naught. The court recited in its order that the possibilities of rehabilitation by the bankrupt were very remote.

December 17, 1938, the Court of Common Pleas, Mercer County, Ohio, confirmed (R. 82-83) the sale which was had on March 14, 1938 to Peoples Bank (John C. Weigel, cashier) and ordered satisfaction of mortgages and lease, with exception of balance due on second mortgage. The sheriff's deed was thereupon delivered (R. 84-86). Writ of possession dated December 29, 1938, was issued by order of the state court to the sheriff and returned executed February 28, 1939 (R. 3, 26). It appears Wenning was dispossessed on February 25, 1939 (R. 34A, 36), at which time no federal case was pending.

November 16, 1938, some 36 days after the second federal court case was dismissed on October 10th, petitioner filed therein a petition for rehearing (R. 51), which was dismissed on January 11, 1939 (R. 51). January 2, 1942, petitioner filed application for order to reinstate second federal court petition (R. 51, 105C), which was dismissed June 5, 1943 (R. 105D).

January 20, 1939, petitioner, Wenning, moved in the Common Pleas Court of Mercer County, Ohio, to recall the writ of possession (R. 3). February 7, 1939, that motion was heard and entry denying the same filed on February 24, 1939 (R. 103A). February 20, 1939, petitioner filed in the Common Pleas Court, Mercer County, Ohio, motion for a new trial and rehearing (R. 3) and on February 25, 1939, filed another motion for new trial and rehearing (R. 3) both of which were denied March 7, 1939 (R. 3, 112).

No appeal was ever taken by petitioner from the decisions or orders of the Common Pleas Court of Mercer County, Ohio, or from the order dismissing the petition in the second federal case. The first federal case had been voluntarily dismissed (R. 47, 48).

By his second amended petition, filed February 28, 1948 (R. 7-13A) in a new suit in the Common Pleas Court of Mercer County, Ohio, petitioner sought, among other things, collaterally to impeach the orders and judgments with reference to the foreclosure on the petitioner's farm and to hold such orders and judgments to be void. The court dismissed the petition (R. 114-115); the Court of Appeals, Third Appellate Judicial District of Ohio, affirmed (R. 130); and the Supreme Court of the State of Ohio dismissed appeal as of right and overruled motion to certify (R. 141).

ARGUMENT.

1. (a) The foreclosure suit of respondent Peoples Bank in the state court was validly instituted on September 26, 1934, when no federal case was pending. The proceedings in the state court prior to January 26, 1938, do not affect

the matters involved here because the foreclosure against petitioner's farm was on the judgment and decree of Federal Land Bank of Louisville, the first mortgage holder, pursuant to its answer and cross-petition. The first federal suit instituted October 2, 1934, had been voluntarily dismissed August 28, 1935.

(b) The judgment and decree of foreclosure on January 26 1938, at the instance and in favor of Federal Land Bank of Louisville were valid. There was no federal case pending at that time. The subsequent ministerial acts in the state court case, such as the order of sale of January 31, 1938, and the sheriff's sale and report of sale did not affect the possession of petitioner, Wenning, nor his right to redeem. He remained in possession until February 25, 1939, or about four and one-half years after Peoples Bank brought the foreclosure suit. Under the law of Ohio (GC 11690, 4 Throckmorton's Ohio Code Annotated, page 499), Wenning could have redeemed up to the time of the order of confirmation of the sale, which was on December 17, 1938. See *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1, 7; memorandum of Common Pleas Judge (R. 110-113); opinion of Court of Appeals, Third Appellate Judicial District of Ohio (R. 125-129).

The second federal suit, at the time of the confirmation of the sale December 17, 1938, had been previously dismissed on October 10th and all stay orders theretofore entered therein set aside and held for naught. As this Court said in *Bernards* v. *Johnson*, 314 U. S. 19, 32:

> "• • • Orders and decrees entered by the bankruptcy court, if valid, relieve the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceeding and left them free to prosecute the foreclosures in the state courts."

Kalb v. *Feuerstein*, 308 U. S. 433, strenuously relied upon by petitioner here, is distinguishable from the foreclosure

proceedings in the Wenning case because Kalb had duly pending in the bankruptcy court a petition for composition and extension of time to pay his debts under Section 75 of the Bankruptcy Act at the time the state court granted the mortgagees' motion for confirmation of the sheriff's sale; at the time the writ of assistance from the state court was obtained, and at the time the sheriff ejected appellant from his farm.

(c) Petitioner's motion for rehearing filed in the second federal case November 16, 1938, 36 days after that case was dismissed on October 10th would not, *ipso facto*, reinstate that federal case or supersede that court's own order dismissing the case and setting aside all previous stay orders. Cf. Rule 59 of the then Federal Rules of Civil Procedure; *Lieshman* v. *Associated Wholesale Electric Company*, 318 U. S. 203, 206. *A fortiori*, the state court would not thereby be ousted of jurdisdiction as otherwise, the case in the federal court could be, merely at the instance of petitioner, revived, reinstated, and prolonged indefinitely by ungranted motion, or successive motions, for rehearing, and all the time it would be contended the state court would be deprived of jurisdiction to act. This Court said in *Union Joint Stock Land Bank* v. *Byerly*, 310 U. S. 1, 8:

> "The termination of the bankruptcy proceeding restored the jurisdiction and power of the State court and its further proceedings in the foreclosure suit were not subject to attack in the bankruptcy court.
>
> "Although the State court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the State court's procedure, it was as if no bankruptcy case had ever existed."

2. Petitioner, Wenning, by his second amended petition filed February 28, 1948 (R. 7-13A) in the Common Pleas of Mercer County, Ohio, in a new suit instituted by him in

which respondents were made parties defendant, sought, among other things, collaterally to attack the foreclosure proceedinges under which petitioner's farm was disposed of to People's Bank, the second mortgage holder, on the order of court procured at the instance of the Federal Land Bank of Louisville, the first mortgage holder.[1]

January 20, 1939, petitioner filed, through counsel, motion in the state court foreclosure proceedings to recall the writ of possession (R. 3). February 7, 1939, the motion to recall the writ of possession was denied, entry denying the same being filed on February 24, 1939 (R. 103A). Moreover, in February, 1939, petitioner filed two different motions for a new trial and a rehearing in the state court foreclosure case (R. 3), both of which were denied, entry being filed on March 7, 1939 (R. 3, 112). Thus, a direct attack had been made by the petitioner on the validity of the orders made in the foreclosure proceedings. Petitioner, having failed to prosecute a timely appeal from the contested orders in the state court foreclosure proceedings, which he could have done (R. 112-113, 128-129), is bound thereby and is now estopped under the principles of *res judicata* collaterally to attack the validity of those proceedings or to relitigate the matters determined therein. This is especially so, since no appeal was taken from the dismissal of the second federal court petition. *Sunshine Anthracite Coal Company* v. *Adkins*, 310 U. S. 381; *Treinies* v. *Sunshine Mining Company*, 308 U. S. 66, rehearing denied, 309 U. S. 693; *Bernards* v. *Johnson*, 314 U. S. 19; *Robertson* v. *Howard*, 229 U. S. 254; *Wheat* v. *Texas Land & Mortgage Company*, 153 F. 2d 926.

3. From the record before the Court, it is plain that petitioner was given ample opportunity both under state and

[1] Petitioner seeks to have declared void order of sale and confirmation of sale obtained by Federal Land Bank of Louisville, which is not a party to the collateral proceeding now involved in the petition for a writ of certiorari.

federal legislation to rehabilitate himself financially but he was unable or failed to do so. More than four years passed after the institution of the original foreclosure suit before the confirmation of sale took place. In the meantime, petitioner was unable to meet the provisions of Section 75 of the Bankruptcy Act, as amended, and his petition was dismissed. Section 75 was intended to enable farm debtors to retain control of their property by turning over to their creditors the fair and reasonable value of their property but Wenning was evidently unable even to do this; hence his federal court second petition was dismissed. His farm was not taken away from him until February 25, 1939, almost four and one-half years after foreclosure was originally instituted. No appeal was taken by him from any orders of the state or federal court except, of course, the orders in the collateral suit which he much later prosecuted. His collateral attack upon the foreclosure proceedings was instituted December 31, 1941 (R. 114-115) but drifted along for over six years until a second amended petition was filed February 28, 1948 (R. 7-13A) and the suit belatedly prosecuted.

CONCLUSION.

It is respectfully submitted that the writ should be denied because there is not involved any state court judgment or action which was in conflict with the Constitution of the United States; with any federal statute, or with a decision of this Court.

HENRY J. KNAPKE,
Celina, Ohio,

KAHL, K. SPRIGGS,
Washington, D. C.,
Attorneys for Respondents

The Peoples Bank Company of Coldwater, Ohio; John C. Weigel, and Joseph Pleiman.

October, 1950.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL, JOSEPH PLEIMAN, GEORGE FRONING, EMMA FRONING, LAWRENCE M. DAVIS, RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF HARTFORD, CONNECTICUT,

Respondents

STATEMENT AGAINST JURISDICTION OF THE UNITED STATES SUPREME COURT AND MOTION TO DISMISS.

Now comes Lawrence M. Davis, former Sheriff of Mercer County, Ohio, Ralph J. Ahlers, former Deputy Sheriff of Mercer County, Ohio and the Century Indemnity Company of Hartford, Connecticut, Surety on Sheriff Davis' Bond, and move the Court to dismiss this appeal as of right for

the reason that no debatable Constitutional question is involved.

In the decision as rendered by the State Court (Common Pleas, Court of Appeals and Supreme Court) there were no decisions against the validity of any of the numerous statutes of the United States that are numbered and quoted in the statement in support of jurisdiction as has been filed by the appellant herein. In none of the opinions in the State Courts as decreed was there drawn in question the validity of a state statute of Ohio on the ground of its being repugnant to the Constitution or laws of the United States and the decision in favor of the validity of the State Statute.

WHEREFORE: As the decision of a federal question was not necessary to the judgments rendered and was not made the ground of such judgments, the respondents move that the appeal of Joseph G. Wenning be dismissed for want of jurisdiction.

Dated this 25th day of July, 1950.

CARLETON CARL REISER,
Attorney for Lawrence M. Davis, former Sheriff of Mercer County, Ohio; Ralph J. Ahlers, former Deputy Sheriff of Mercer County, Ohio and the Century Indemnity Company of Hartford, Connecticut, Surety on Sheriff Davis' Bond.

SEP 6 1950
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 293

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; JOHN C. WEIGEL; JOSEPH PLEIMAN; GEORGE FRONING; EMMA FRONING; LAWRENCE M. DAVIS; RALPH J. AHLERS; THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT; THE UNITED STATES FIDELITY AND GUARANTY COMPANY, OF HARTFORD, CONNECTICUT,

Respondents

STATEMENT AGAINST JURISDICTION OF THE UNITED STATES SUPREME COURT AND MOTION TO DISMISS.

The Peoples Bank Company of Coldwater, Ohio, filed its petition for foreclosure against Joseph G. Wenning, the Appellant, on September 7, 1934, in the Court of Common Pleas of Mercer County, Ohio, when the Court had exclusive jurisdiction of the parties and subject matter, as the petition of Wenning as a farmer debtor was filed in the Federal Court, subsequent to said date. The voluntary dismissal by Wenning of the entire proceedings under # 75, 11 USCA # 203, on August 6th, 1935, rendered such

proceedings nugatory and the conditions were then the same as if such proceedings were never instituted in the Federal Court.

When the Federal Land Bank of Louisville, Kentucky, obtained a judgment against Joseph G. Wenning in the same case on its answer and cross-petition, on *January 26th, 1938,* which judgment and decree ordered foreclosure, sale and appraisement, there was a valid judgment in the court of Common Pleas of Mercer County, Ohio, as Wenning did not have a federal case pending in bankruptcy at that time (this is not disputed as it was admitted by counsel for appellant in the Courts below).

On *October 10th, 1938,* The Federal District Court dismissed the petition of Joseph G. Wenning, as a farmer debtor, and ordered that all stay orders heretofore entered hereunder are set aside and held for naught.

On December 17th, 1938, The Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said real estate to the purchaser, as the result of a sale held by the sheriff on March 12th, 1938, and Joseph G. Wenning did not have a federal case pending in bankruptcy at that time. The state court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked. (*Robertson* v. *Haward,* 229 U. S. 254.)

In the case of *Union Joint Stock Land Bank of Detroit* v. *Byerly,* 310 U. S. 1, the court said: "The sale was, however, incomplete until confirmation by the Court. Until confirmation it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceedings were pending. The termination of the bankruptcy proceedings restored the jurisdiction and power of the State Court. . . . Although the State Court's jurisdiction was suspended by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case,

and, thence forward, as respects the foreclosure suit, and the State Court's procedure, it was as if no bankruptcy case had ever existed".

After discussing the actions of the State court in the Byerly case, the court in its opinion said:

> "If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding".

In the decisions as rendered by the State Courts (Common Pleas; Court of Appeals and Supreme Court) there were no decisions against the validity of any of the numerous statutes of the United States that are numbered and quoted in the statement in support of jurisdiction, as has been filed by the appellant herein.

In none of the opinions in the State Courts as decreed, was there drawn in question the validity of a state statute of Ohio on the ground of its being repugnant to the Constitution or laws of the United States and the decision in favor of the validity of the state statute.

WHEREFORE: As the decision of a federal question was not necessary to the judgments rendered and was not made the ground of such judgments, the respondents move that the appeal of Joseph G. Wenning be dismissed for want of jurisdiction.

Dated this 22nd day of July 1950.

HENRY J. KNAPKE,
Attorney for The Peoples Bank Company of Coldwater, Ohio; Joseph Pleiman and John C. Weigel, Appellees.

KAHL K. SPRIGGS,
Of Counsel.

FILED

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NO. 283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

JOSEPH G. WEHRING, *Petitioner*,

v.

THE PROVIDENT RATIO COMPANY OF CLEVELAND, OHIO, JOHN C. WHEELE, JOSEPH PLEIMAN, GEORGE PROVINE, EMMA PROVINE, LAWRENCE M. DAVIS, RALPH J. ABLERT, THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION FOR RESPONDENTS

Lawrence M. Davis, Former Sheriff of Marion County, Ohio, Ralph J. Ablert, Former Deputy Sheriff of Marion County, Ohio, The Century Indemnity Company of Hartford, Connecticut, and the United States Fidelity and Guaranty Company of Baltimore, Maryland

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Counsel for Respondents, Lawrence M. Davis, Ralph J. Ablert, and The Century Indemnity Company of Hartford, Connecticut.

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Phillips Law Printing Co., Washington, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 293.

JOSEPH G. WENNING, *Petitioner*,

v.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO, JOHN C. WEIGLE, JOSEPH PLEIMAN, GEORGE FRONING, EMMA FRONING, LAWRENCE M. DAVIS, RALPH J. AHLERS, THE CENTURY INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF HARTFORD, CONNECTICUT, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION.

Opinions Below

No opinion was rendered by the Supreme Court of Ohio. Its decision (folio 137-8, R.) is reported in 153 Ohio State 583. The opinion of the Court of Appeals (folio 125-9, R.) of Ohio has not been published. The opinion of the Common Pleas Court of Ohio (folio 110-13, R.) has not been published.

Jurisdiction.

The judgment of the Supreme Court of the State of Ohio was entered on March 22, 1950. Petitioner's motion in the

Supreme Court of Ohio for an order to the Court of Appeals of Ohio to certify its record was overruled on March 22, 1950 (folio 137-8, R.) An order denying a rehearing was entered by the Supreme Court of the State of Ohio on April 12, 1950 (folio 140, R.). By an order entered in this proceeding on June 17, 1950, the time for the filing of a petition for certiorari was extended to and including September 8, 1950. The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1257(3).

Question Presented.

Whether (1) the action of the state court in foreclosing petitioner's property is subject to attack where that action was taken in the absence of any restraint by the Federal Court in bankruptcy proceedings instituted by petitioner which were ultimately dismissed and whether (2) the failure of petitioner to appeal from an order overruling a motion for the recall of a writ of assistance or possession in the proceeding in which his property was foreclosed is not *res judicata* of a collateral suit in the same court attacking the validity of the foreclosure.

Statutes Involved.

The pertinent provisions of the Bankruptcy Act and Ohio Statutes are set forth in the petition at pages 4-6.

Statement of the Case.

September 7th, 1934—Petition in foreclosure filed by The Peoples Bank Company, Coldwater, Ohio, holder of second mortgage, in case No. 12534 of Common Pleas Court of Mercer County, Ohio, against Joseph G. Wenning et al. The Federal Land Bank of Louisville, Kentucky, holder of first mortgage being one of the parties defendant. Ex. 1, folio 1, R.

January 26th, 1938—Judgment and decree of foreclosure to Federal Land Bank on answer and cross-petition, in same case, Ordering Foreclosure—Ordering Sale and Ordering Appraisement. Ex. A, folio 101, R.

(No Federal case pending on this date, per pertinent proceedings listed on pages 24 and 25 of petitioner's brief, and admitted on page 40 of said brief.)

January 28th, 1938 to October 10th, 1938—The petitioner, Joseph G. Wenning, had a petition pending in Federal Court, during which time the sheriff appraised, advertised and sold farm, but Common Pleas Court of Mercer County did not approve or confirm, or make any order or decree with reference thereto.

October 10th, 1938—The Federal Court dismissed the petition of Joseph G. Wenning, as a farmer debtor, and ordered that all stay orders heretofore entered thereunder be set aside and held for naught. Ex. C, folio 104-5, R.

December 17th, 1938—The Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said real estate to John C. Weigel, as a result of the sale held on March 12th, 1938, by the Sheriff. Ex. 22, 23, folio 82, 84, R.

(No Federal case pending on this date, per pertinent proceedings listed on pages 25 and 26 of petitioner's brief.)

December 29th, 1938—Order for writ of possession issued by Common Pleas Court. Ex. 1, folio 1, R. Ex. 24, folio 87, R.

January 20th, 1939—Motion of farmer debtor, Joseph G. Wenning, in Common Pleas Court of Mercer County, Ohio, to recall writ of possession, which alleged the Court's lack of jurisdiction in the cause. Ex. 1, folio 1, R.

ARGUMENT.

The substance of the brief and argument of the petitioner is, that the state courts of Ohio have decided a federal question in a way probably not in accord with applicable decisions of the United States Supreme Court.

The applicable decision referred to by the petitioner, is the case of *Kalb* v. *Feuerstein*, 308 U. S. 453, which progressed into the State Supreme Court of Wisconsin and came on appeal to this Court.

The *Kalb* v. *Feuerstein* case is distinguished from this case in the following pertinent particulars, to-wit: In the *Kalb* v. *Feuerstein* case, the state court of Wisconsin confirmed the foreclosure sale while the petition of the farmer debtor was pending under Sec. 75 (a) to (r) for composition or extension. In this case the Court of Common Pleas of Mercer County, Ohio, did not confirm the sale until Wenning's petition in the Federal Court had been dismissed and in which entry of dismissal, the Federal Court ordered that all stay orders heretofore entered thereunder were set aside and held for naught. Ex. C, folio 104-5, R.

When the Court of Common Pleas of Mercer County, Ohio, entered its judgment and decree of foreclosure to the Federal Land Bank of Louisville, Ky. (Ex. A, folio 101, R.) and ordered foreclosure, appraisement and sale in the same entry, Wenning did not have a case pending in Federal court as a farmer debtor or otherwise. This is the judgment rendered on January 26th, 1938, that resulted in the sale of Wenning's farm by the sheriff.

When the Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said farm to John C. Wiegel (Ex. 22, 23, folio 82, 84, R.), Wenning did not have a case pending in Federal Court as a farmer debtor or otherwise. The sale was confirmed on December 17, 1938, and the Federal Court had dismissed Wenning on October 10, 1938.

At no time between January 26th, 1938 (decree of sale, foreclosure and appraisement date) and December 17, 1938, (confirmation of sale date) did the Court of Common Pleas of Mercer County, Ohio, make any orders or execute any entries with reference to this case. Any acts performed with reference to this case between said dates, were performed by ministerial agents of the court, the sheriff and the clerk.

In the case of *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 310 U. S. 1, which was a case very much like the case at hand, the court said (p. 7): "The sale was, however, incomplete until confirmation by the court. Until confirmation it amounted to an unaccepted offer to pur-

chase. No sale was consummated while the bankruptcy proceeding was pending".

We quote from page 8 of the opinion of the Court in said case as follows:

> "The termination of the bankruptcy proceedings restored the jurisdiction and power of the state court . . . Although the state court's jurisdiction was superseded by that of the bankruptcy court, it again attached upon the dismissal of the bankruptcy case, and, thenceforward, as respects the foreclosure suit, and the state court's procedure, it was as if no bankruptcy case had ever existed."

After discussing the actions of the state court in the *Byerly* case, the Court in its opinion said (p. 10):

> "If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding."

In this case, the decree of the Federal District Court, dismissing Wenning's petition and declaring void all stay orders issued thereunder, relieved the mortgagees of any disability to pursue their rights under the state law.

> " * * * orders and decrees by bankruptcy courts, if valid, relieved the respondents, as mortgagees, of any disability to pursue their foreclosure suits arising out of the pendency of the bankruptcy proceedings and left them free to prosecute the foreclosures in the state courts. However erroneous the challenged orders, the remedy of their correction was by timely appeal or application for review" *Bernards* v. *Johnson*, 314 U. S. 19, 32.

Therefore the sheriff's sale as conducted by L. M. Davis, one of the respondents herein, by order of the court made at a time when no federal cases were pending, was no more than a receipt of bids, while at the same time holding the debtor and his property in *status quo*. No injury or prejudice to Wenning resulted; nothing happened to

change the relation between Wenning and his property until the Federal Court dismissed his petition in bankruptcy and set aside and held naught all stay orders theretofore entered.

It is the contention of the petitioner that the Court of Common Pleas of Mercer County, Ohio did not have the jurisdiction or power, to make the orders with reference to the foreclosure on the Wenning farm. The same contention was made by Wenning when he filed a motion for recall of the writ of assistance or possession, on January 20th, 1939, in the Common Pleas Court of Mercer County, Ohio, in said foreclosure case (Ex. 1. folio 1, R. Appearance Docket Entries), which motion alleged the Court's lack of jurisdiction in the cause. This was a direct attack on the validity of the orders made and the jurisdiction of the Court to enter such orders.

Wenning, having failed to prosecute a timely appeal from the court's order overruling the motion, is bound thereby and is now estopped, under the principles of *res judicata*, to attack the validity of the proceedings had in such cause or to relitigate the matters determined therein.

> " * * * the principles of *res judicata* apply to questions of jurisdiction as well as to other issues".
>
> *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 403;
> see also *Treinies* v. *Sunshine Mining Co.,* 308 U. S. 66, rehearing denied, 309 U. S. 693.

Aside from the question of whether the sheriff, Davis his deputy, Ahlers, and the former's surety have any liability for these acts performed in the official course of the sheriff's duty, it is patent from any point of view that the surety of the deputy sheriff, the United States Fidelity & Guaranty Company, could have no liability in this proceeding on a bond which runs only to the sheriff and is a private obligation in his favor.

Conclusion.

The writ should be denied because there is not involved a state court decision that is contradictory to a decision of this Court and the petitioner has not been deprived of his property without due process of law.

Respectfully submitted,

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Celina, Ohio

ALEXANDER M. HERON
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DAVID ARMSTRONG
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Celina, Ohio
September 29, 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 293

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Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio.

REPLY BRIEFS

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REPLY BRIEFS

In Reply to Briefs of Respondents.

PRELIMINARY STATEMENT.

All emphasis herein is supplied unless otherwise stated.

Two Reply Briefs are here presented:

I. Reply to "Brief in Opposition for Respondents": Lawrence M. Davis, Former Sheriff of Mercer County,

Ohio; Ralph J. Ahlers, Former Deputy Sheriff of Mercer County, Ohio; The Century Indemnity Company of Hartford, Connecticut and the United States Fidelity and Guaranty Company of Baltimore, Maryland.

II. Reply to "Brief for Respondents": The Peoples Bank Company of Coldwater, Ohio; John C. Weigel and Joseph Pleiman "In Opposition".

I.

REPLY TO BRIEF OF RESPONDENTS DAVIS, AHLERS, THE CENTURY INDEMNITY COMPANY, AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

This Reply Brief will reply to the said Respondents' Brief in the order of the paging of their brief.

Page 2 of the Brief of Davis, et al.

(Under "Questions Presented" that the questions are:

(1) Whether "in absence of restraint by the Federal Court" a state foreclosure is subject to attack and

(2) Whether failure to appeal the state court's refusal to recall its writ of assistance does not make such refusal *res judicata.*)

We think these questions have been categorically decided by this Court:

(1) In *Kalb* v. *Feuerstein,* 308 US 433 where at page 436 this Court said:

> "No stay of the foreclosure or of the subsequent action to enforce it was ever sought or granted in the

State or bankruptcy Court",

and at page 440:

"Congress intended to and did deprive the Wisconsin County Court of the power and jurisdiction to continue or maintain in any manner the foreclosure proceedings against appellants without the consent after hearing of the bankruptcy court",

and at page 443:

"Because that State Court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of the sale, the execution of the sale, the execution of the sheriff's deed, the writ of assistance, and the ejection of appellants from their property—to the extent based upon the court's actions —were all without authority of law.",

and no less than sixteen times in that decision this Court declared that all actions of the state court while the farmer-debtor action was pending in the federal court were absolute *nullities, utterly void, of no effect.*

And (2) the suggestion that the refusal of the state court to recall its writ of assistance, not having been appealed, is *res judicata* was likewise answered in the negative by this Court in *Kalb* v. *Feuerstein*, 308 US 433. The opinion at 436 posed the questions before it as being whether the state court had jurisdiction and

"if it did not, *whether its action in the absence of direct appeal is subject to collateral attack.*"

At page 438 this Court quoted *the State court opinion* where it had held:

"No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the" [state] "circuit court is void." (So the state court had said.)

and this Court's answer to that position was at page 438 where it said:

> "the action of the Walworth County Court was not merely erroneous but was *beyond its power, void and subject to collateral attack.*"

Also at page 444 this Court said:

> "considerations as to whether the issue of jurisdiction was actually contested in the County Court, or whether it could have been contested are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

Therefore in place of the two "Questions Presented" as suggested by said respondents we suggest that they are beyond all cavil superceded by the simple Question: "Whether a state court may finally determine a federal question in a way conflicting with applicable decisions of this Court" as put at page 12 of the petitioner's Petition for Certiorari.

Page 3 of the Brief of Davis, et al.

(That the Federal Court in dismissing the farmer debtor petition "ordered that all stay orders heretofore entered thereunder be set aside and held for naught. Ex. C., folio 104-5, R. ")

We do not conceive that it can be even plausibly argued that such an order can be construed to mean any more than that upon its entry any "stay orders" theretofore entered were *then, not retroactively,* nullified. If a district court of the United States may *nunc pro tunc* make its order retroactively give life and effectiveness to state proceedings which the statute law of the United States and the decisions of this Court have declared "utter nullities, void, of no effect", then verily that district court has overruled the

Constitution of the United States, and the statutes of the United States, as adjudicated by this Court which that Constitution declared are the "supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It never could have occurred to the "founding fathers" that an inferior *United States* court could by its order amend the Constitution and overrule the statutes of the United States and the decisions of this Court. We do not think the judge of the district court in his order ever contemplated that the phrase "set aside and held for naught" could carry more connotation that the present tense imports, namely that its order *speaks from its entry* and not from some long past date.

Since the opposition of the respondents must rest or fall upon their argument that, notwithstanding actions which when they occurred were "nullities, void, of no effect" (*Kalb* v. *Feuerstein*, 308 US 433), yet they nevertheless subsequently could be given life, beginning even as of the very date when they were "nullities, void, of no effect" by an *ex post facto* order entered ten months later, that argument is here examined to see what it is worth.

Under Section 75(o) the United States district court was given express authority "upon petition made to and granted by the judge, after hearing and report by the conciliation commissioner" to restore power to the state court to proceed in the foreclosure case while the *petition* under Section 75(a) to (r) of the farmer debtor was pending in the United States Court. *No such authority was ever sought or granted.* How then could the United States Court ten months later, *after all proceedings relating to the petition under Sections (a) to (r) had been fully completed and terminated* and while proceedings under another

statute, Section 75 (s), were pending, do what it had not been requested by petition to do pursuant to Section 75(o) and had not done?

Further this so-called "dismissal" by the federal court was erroneous as this Court declared, prior to *Kalb* v. *Feuerstein*, 308 US 433, in *John Hancock* v. *Bartels*, 308 US 180. In that case all proceedings had been completed under Section 75 (a) to (r) and the farmer-debtor filed his amended petition under Section 75 (s) which the United States district court dismissed upon motion of a secured creditor, all as in this *Wenning* case. This Court sustained the Appellate Court in reversing the district court and said at page 183:

> "We think that the District Judge failed to follow the *mandate of the statute* and that the Circuit Court of Appeals was right in reversing the judgment and ordering the proceedings to be reinstated."

And still further, under the Section 75(s) proceeding in the *Wenning* case the conciliation commissioner issued and served upon the state court judge, the sheriff and the Federal Land Bank a specific restraining order. See reference to that order in both state and federal courts at page 26 of the Petition herein, under date of March 7-9, 1938 and Ex. 20, 21, folio 76, 79, R. . That order was flagrantly disregarded before the so-called "dismissal." See the same page 26 of the Petition herein under date of March 12-14, 1938, Ex. 1, folio 1, R. . Ex. 16, folio 69, R. and at the same page the entry of October 10, 1938. Ex. C, folio 104-5, R. .

The essential and governing point is that nothing done by or in a state or federal court could change the imperative prohibitions of Sec. 75 (n) and (o), *Kalb* v. *Feuerstein*, 308 US 433. Consequently the dismissal of a farmer debtor proceeding could not make *valid* what was *void*.

UNLESS THIS WERE TRUE, THE WHOLE SCHEME OF THE STATUTE WOULD BE EFFECTIVELY DESTROYED and UNITED STATES STATUTES AND DECISIONS OF THIS COURT STULTIFIED by merely proceeding with a pending foreclosure despite the positive prohibitions making them nullities, of Sec. 75 (o) and the decisions of this Court in *Kalb* v. *Feuerstein*, 308 US 433 and in *John Hancock* v. *Bartels*, 308 US 180. SUCH DISREGARD AND DISRESPECT FOR LAW BY CREDITORS, JUDGES AND COURTS, STATE AND FEDERAL, WOULD INVITE DEFIANT LITIGATION BY CREDITORS in the hope that in a portion of instances farmer debtor cases would be subsequently dismissed, thus retroactively putting validity into what was in the most positive language of statute and decision declared to be NULLITIES.

This would also compel the farmer debtor to continue to defend himself and his property in the state foreclosure proceedings, *in spite of this Court's positive decree* in *Kalb* v. *Feuerstein*, 308 US 433, at the end of the opinion at page 444 that *"the issue of jurisdiction in the foreclosing court need not be contested or even raised by the distressed farmer debtor."*

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(That *Kalb* v. *Feuerstein*, 308 US 433 is distinguishable from this *Wenning* case.)

1. Statement: That the Wisconsin court *confirmed* the foreclosure sale *While the farmer debtor petition* was pending but that the Ohio Court confirmed the sale after the farmer debtor *petition* was dismissed by the Ohio federal court which ordered all stay orders theretofore entered "set aside and held for naught."

Answer: a. The Ohio federal court did not dismiss the petition under Section 75 (a) to (r) for composition or extension but dismissed the case under the *amended petition under Section 75 (s)*, a different statute, for a stay and redemption. All proceedings had been completed under Section 75 (a) to (r) and a new and different set of proceedings initiated for an entirely different purpose under Sec. 75(s).

b. No stay order was ever issued under the *petition* filed pursuant to Section 75 (a) to (r) and no word in the "dismissal order" purported to relate to the *petition* under Section 75 (a) to (r). No stay order was necessary under Section 75 (a) to (r) because Section 75 (o) mandatorily made *all proceedings* in the foreclosure court "nullities, void, of no effect." *Kalb* v. *Feuerstein*, 308 US 433.

c. The "confirmation" of foreclosure sale by the state court attempted to confirm what never existed. *Not only* were the "order of sale" and the "appraisement" "nullities, void, of no effect," because they were attempted while the *petition* under Section 75 (a) to (r) pended (See the Petition herein, page 25, entries in federal and state courts dated January 28, 1938. Ex. 3, folio 49, R. ; Ex. 12A, folio 63, R. ; Ex. 12 C, folio 65, R. ; January 31, 1938, Ex. 1, folio 1, R. . January 8, 1938, Ex. 1, folio 1, R.) *but also* the attempted sheriff's sale was held and reported in violation of the restraining order issued by the conciliation commissioner. See Petition herein, page 26, entries of March 7-9, 1938 in federal and state courts. Ex. 20, 21, folio 76, 79, R. . Entry March 12-14, 1938, Ex. 1, folio 1, R. , Ex. 16, folio 69, R. .

We believe it has been demonstrated at page 5 of this brief that the federal court could not restore life to proceedings and orders which were mandatorily "nullities, void of no effect" ten months before when attempted in

violation of Section 75 (o) and in violation of the restraining order issued and served out of the federal court.

2. Statement: That the judgment and decree of foreclosure to the Federal Land Bank was valid. Agreed, because no federal case was pending.

That when the Ohio Court "confirmed" the sale there was no federal case pending.

Answer: We are not certain that there was no federal case then pending because a petition for rehearing of the dismissal order was filed November 16, 1938 (See page 26 of the Petition herein, entry of November 16, 1938) and the "confirmation" was entered before that petition for rehearing was denied on January 11, 1939. See page 27 of the Petition herein. It is universally recognized law that an order which is the subject of a petition for rehearing is suspended in its effect until the petition for rehearing is disposed of. For instance: the time for appeal and certiorari in this matter ran from the date of the denial of rehearing by the Ohio Supreme Court.

2. Statement: That as the "confirmation" was entered when no federal case was pending therefore it was effective.

Answer: The Ohio Court could not by an *ex post facto* entry make an order of sale, and an appraisement, valid which were "nullities, void, of no effect" when attempted. A thing that is a nullity, void, of no effect, never existed at all. In Ohio no court has jurisdiction to hear a divorce petition until six weeks after service of summons. Query, if the court presumed to hear a divorce petition, the same day it was filed and entered a decree of divorce and distributed property, would any title be divested? No, because the attempted decree was a nullity, void, of no effect. Then suppose one of the parties filed a petition seeking

enforcement of the decree and after proper service the court, having jurisdiction, sought to punish for violation of the decree, which never existed! Likewise as to the "confirmation" of sale it is precisely the same as if the Ohio court never issued an order of sale and no appraisement was ever made. Then, query, if the Court would "confirm" the "sale" would any title be disturbed or transferred? No power can confirm what never existed.

In Ohio an order of sale is an absolute prerequisite to a sale in foreclosure.

> 24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17: "A judicial sale has its *very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act.* Furthermore, purchasers at a judicial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but *the order must be made prior to the sale.*"

4. Statement: That at no time while the federal court had exclusive jurisdiction did the Ohio court "make any orders or execute any entries with reference to this case. *Any acts performed with reference to this case between said dates, were performed by ministerial agents of the court, the sheriff and clerk.*"

Answer: *Kalb* v. *Feuerstein*, 308 US 433:

> "The mortgagees who sought to enforce the mortgage after the petition was duly filed in the bankruptcy court of Walworth County Court that attempted to grant the mortgagees relief, and the sheriff who enforced the court's judgment were all acting in violation of the controlling Act of Congress. Because that State court had been deprived of all jurisdiction or power to proceed with the foreclosure, the confirmation of sale, *the execution of the sheriff's deed, the writ of*

assistance, and the ejection of appellants from their property—to the extent *based upon the Court's action were all without authority of law.*"

The sheriff (and of course the clerk) though "ministerial agents of the court" were held amenable to Section 75 (o) by its words:

"the following proceedings shall not be . . . maintained . . . *sale* . . . under any . . . *mortgage*"

and by Section 75 (p):

"The prohibitions of subsection (o) shall apply to all judicial or *official proceedings* in any court or under the direction of *any official* . . ."

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(That the case of *Union Joint Stock Land Bank* v. *Byerly,* 210 US 1 "was a case very much like the case at hand", citing also *Bernards* v. *Johnson,* 314 US 19, 32.)

Union Joint Stock Land Bank v. *Byerly,* 310 US 1 is not in any substantial way like this case. There the federal judge by his formal order in a case pending in his court under Section 75, expressly directed the state court to proceed with sale in foreclosure (on the creditor's plea that expense had been incurred in advertising it before the federal jurisdiction had been attached). This court recognized that such an order was erroneous, occurring within the exclusive power of the federal court, but hold that the state court was justified in taking it for granted that the federal judge knew federal law and that the sale could properly proceed pursuant to the order directed to it out of the federal court. It further held that the federal judge, though having POWER, granted in Sec. 75 (o), to authorize state court action in the pending foreclosure, had not pursued the proper procedure in granting it. Therefore, said the majority, the order of the district judge was er-

roneous and was subject to correction by review but it was not void because he had POWER to act.

Three justices vigorously dissented from that reasoning of the majority. The difference of opinion was restricted to the *method* by which the *federal judge* exercised his statutory POWER (in Sec. 75 (o)) to authorize the *state court* to hold the foreclosure sale. All agreed he had complete POWER to do so; he did it in a manner different from that prescribed. This was what the majority opinion said was merely *erroneous,* not void, and therefore it could not be corrected by collateral attack but only by review on appeal.

Even so the three justices (namely Justices Black, Douglas and Murphy) in their dissenting opinion of more than six pages, opened and closed their dissent with the statements (1) that the effect of the majority decision "would be largely to defeat the purposes of the Act" (page 11) and (2) that it provided "a ready means of circumventing the Act" (page 16).

Within a month after the divided court decision in the *Byerly* case, 310 US 1, decided April 22, 1940 it unanimously held in *Borchard* v. *California Bank,* 310 US 311, decided May 20, 1940, that where a federal judge in *three* formal orders failed to follow the statutory procedure laid down in Sec. 75, they were void and again this Court admonished the courts to obey and follow the "mandate of the statute". In the *Borchard* case no state court was involved and thus no excuse existed for saving the validity of the erroneous order upon the reasoning that a state court was justified in taking it for granted that a federal judge knew federal law, especially when the federal judge had POWER to do what he ordered but exercised that POWER in a method at variance with the statutory procedure.

The *Byerly* and *Wenning* cases differ in vital particulars. The *Byerly* sale was held by *express direction in an order of the federal judge. The federal judge had authority* (under Sec. 75 (o)) to issue the order to the state court to go ahead and sell but did not observe the statutory *procedure.* No order of any sort was sought or issued in this *Wenning* case by which the foreclosure sale could proceed. Likewise in *Kalb* v. *Feuerstein,* 308 US 433, no permission to foreclosure was sought or granted. No restraining order was sought or issued in the *Kalb* case, whereas restraining orders were served on the judge, the sheriff and counsel for the Land Bank in the *Wenning* case prior to the sheriff's purported sale. Ex. 20, 21 folio 76, 79, R. . See Petition herein at page 26, entries in federal and state court dated March 7-9, 1938.

The essence of the distinction between the *Byerly* and *Wenning* cases is that the *Byerly* procedure was held to be erroneous and voidable not void and not subject to collateral attack, while in the *Wenning* case the purported sale was not only without the essential prerequisite but in defiance of a restraining order and therefore void and subject to collateral attack.

The legal situation in the *Wenning* case is precisely like that *Kalb* v. *Feuerstein,* 308 US 433, with the added feature that there was a restraining order in the *Wenning* case and none in the *Kalb* case.

The citation to *Bernards* v. *Johnson,* 314 US 19, 32 supports the theory of the *Byerly* case, but neither lends any support to the theory that any order out of a federal court will *ex post facto,* and *nunc pro tunc,* validate orders and proceedings of another court which were when attempted, nullities, void, of no effect, where there was no permission either granted or sought upon which the state court might presume to act. Here, in the *Wenning* case not only was

there the statutory prohibition of Section 75 (o) depriving the state court of all power but there was also an express restraining order from the federal court served upon judge, sheriff and party.

Top of page 6 of the Brief of Davis, et al.

(That the defendant in foreclosure having directly attacked the validity of the orders and jurisdiction of the state court, and no appeal having been taken, there can be no collateral attack because of *res judicata.* Citing *Sunshine* v. *Adkins,* 310 US 381, 403, *Treinies* v. *Sunshine,* 308 US 66.)

Answer: In *Kalb* v. *Feuerstein,* 308 US 433, at page 439, the opinion observes:

> "Although the Walworth County Court had general jurisdiction over foreclosures under the law of Wisconsin, a peremptory prohibition by Congress in the exercise of its supreme power over bankruptcy that no State court have jurisdiction over a petitioning farmer-debtor or his property, would have rendered the confirmation of sale and its enforcement beyond the County Court's power and nullities *subject to collateral attack.*"

And at page 444:

> "The protection of the farmers was left to the farmers themselves or to the Commissioners who might be laymen, and considerations as to whether the issue of jurisdiction was *actually contested in the County Court,* or whethere it could have been contested, are not applicable where the plenary power of Congress over bankruptcy has been exercised as in this Act."

In citing the *Sunshine* cases (*Sunshine* v. *Adkins,* 310 US 381, and *Treinies* v. *Sunshine,* 308 US 66) the respondents resort to the confusion of somantics by taking the

word "jurisdiction" used in the sense of the judgment of a court within its POWER and transferring to it all of the connotations of the word POWER itself. The *Sunshine* cases were decided in 308 and 310 United States Supreme Court Reports during the same period and by the same justices who were handing down unanimous decisions that acts of a judge of a federal or state court when POWER had been taken from them by Sec. 75 were nullities. *John Hancock* v. *Bartels*, 308 US 180; *Kalb* v. *Feuerstein*, 308 US 433; *Borchard* v. *California Bank*, 310 US 311; *Wright* v. *Union Central*, 311 US 273.

The later of the *Sunshine* decisions was based upon *Stoll* v. *Gotleib*, 305 US 165 which was cited as a supporting authority in *Kalb* v. *Feuerstein*, 308 US 433 at page 444, in note 18. In that *Sunshine* case it was the definition of bituminous coal and in the *Gotleib* case the right of a creditor in a corporation debtor law proceeding, that is under Sec. 77B. In each instance (to the National Bituminous Coal Commission in one case and to the United States Court in the other case) there was granted POWER TO DEAL WITH AND ADMINISTER THE SUBJECT OF THE STATUTE. Within that power it was the duty of the Commission and of the Court to determine whether it had jurisdiction over a particular subject matter (bituminous coal or a class of creditors) and its decision was final unless reversed upon review.

In the earlier of the *Sunshine* cases the question was whether an Idaho state court's decision was *res judicata* in holding that the judgment of a court of a sister state was beyond the sister state court's jurisdiction. This Court held that the Idaho court had POWER to adjudge whether a court of a sister state had jurisdiction of the subject matter.

It is a legal maxim that "every court has the right to determine its own jurisdiction." But that maxim operates only within the area which comprises the court's POWER. If a court has no POWER, its judgment is void—a nullity. As this Court once said of itself "our most solemn proceedings can confer no right" and are *coram non judice*. *Voorhees* v. *Jackson*, 35 US (10 Pet.) 449, 474. For example an attempt by a United States District Court of a state to grant a divorce or to administer the estate of a deceased person, would be a nullity, even though it declared by most solemn judgment that it had such jurisdiction. The nullity follows from the fact that it has no POWER.

In *Kalb* v. *Feuerstein*, 308 US 433, the Wisconsin state court put the mortgagee in possession under a writ of eviction after a confirmation of foreclosure. Those acts of the state court were *never reviewed;* they were simply ignored because they were beyond the POWER of the state court due to Sec. 75 (n) and (o). In *Wright* v. *Union Central*, 308 US 502, two Indiana State Court decisions in foreclosure matters (and by courts of last resort at that) were also merely ignored because Sec. 75 (n) and (o) deprived all state courts of POWER. Decisions of the state courts that they had power in such circumstances were nullities because they had no POWER to act in any manner whatsoever.

It is submitted that all objections raised by the brief of respondents Davis et al. to the granting of certiorari have been fully answered and there is involved a state court decision contrary to the decisions of this Court, and the validity of federal and state laws raised as repugnant to the Constitution and laws of the United States, in spite of the petitioners claim of immunity, right, title and privilege specially set up and he has been deprived of his property without due process of law.

II.

REPLY TO BRIEF OF RESPONDENTS PEOPLES BANK, WEIGEL AND PLEIMAN.

This Reply Brief will likewise reply to the above named respondents in the order of the paging of their brief.

Since portions of the two briefs are substantially the same, this brief will not repeat arguments to the same points, but refer by page to their discussion in the preceding brief in reply to respondents Davis, et al.

Page 4 of the Brief of Peoples Bank, et al.

In the next to the last paragraph on page 4 of the Peoples Bank brief it is said that "The Court" [*i.e.* the United States District Court] "recited in its order that the possibilities of rehabilitation by the bankrupt were very remote." This reason for dismissal of a farmer debtor proceeding was overruled by this Court in *John Hancock* v. *Bartels,* 308 US 180. The United States District Judge had dismissed a farmer debtor proceeding which was pending under Section 75 (s) in an order like that in this *Wenning* case because, as this court said, at page 183:

> "He" [the District Judge] . . . "found that there was no reasonable probability of the debtor's financial rehabilitation"

at page 184 this Court in reversing the District Judge said:

> "The subsections of Section 75 which regulate the procedure in relation to the effort of a farmer-debtor to obtain a composition or extension contain no provision for a dismissal because of the absence of a reasonable probability of the financial rehabilitation of the debtor."

The Wenning dismissal by the federal court was of course erroneous for the same reason that the Bartels dismissal was erroneous.

Page 6 of the Brief of Peoples Bank, et al.

In paragraph (6) on page 6 of the Peoples Bank brief, it is said that

> "The subsequent ministerial acts in the state court case, such as the order of sale of January 31, 1938, and the sheriff's sale and report of sale did not effect the possession of petitioner, Wenning, nor his right to redeem".

Answer: The implied argument that "ministerial acts in the state court case" were not material or effected by the federal law has been answered at page 10 of the foregoing brief.

As to the statements on the same page 6 of the Peoples Bank brief that the order of sale, the sale and report of sale did not dispossess Mr. Wenning and that he had four and a half years of possession, the same argument was urged in *Kalb* v. *Feuerstein*, 308 US 433 and in *Wright* v. *Logan*, 315 US 139. In the latter case at page 142 of the opinion this Court in reversing the District Court said:

> "Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes."

and referred to *Borchard* v. *California Bank*, 310 US 311, where it had held likewise that petitioning farmer debtors were entitled to have the provisions of Section 75 observed as a "mandate of the statute."

The argument that Mr. Wenning could have redeemed up to the date of the court's "confirmation" of the void sale is requesting this Court to countenance litigants "sneak-

ing up" on their opponents in litigation in the hope of gaining an advantage later. That argument would stultify the statutes and decisions of this Court as discussed at page 7 of the foregoing Reply to the Davis Brief. Mr. Wenning was, and is, entitled to invoke his rights under Section 75 which are quite different to the "right to redeem" under the state law which was supplanted by Section 75 as held by this court in no less than fifteen decisions from *Wright* v. *Vinton*, 300 US 440, to *Wragg* v. *Federal*, 317 US 325.

The citations on the same page 6 of the Peoples Bank brief to *Union Joint Stock Land Bank* v. *Byerly*, 310 US 1, and *Bernards* v. *Johnson*, 314 US 19, 32, are discussed beginning at page 11 and ending at page 14 of the preceding brief.

The contention on the same page 6 of the Peoples Bank brief that *Kalb* v. *Feuerstein*, 308 US 433, is "distinguishable from the foreclosure proceedings in the *Wenning* Case" is fully answered in the preceding brief beginning at page 6.

Page 6 of the Brief of Peoples Bank.

(That a motion filed in the federal court for a rehearing of the dismissal order in the second farmer debtor case prior to the "confirmation" by the state court was ineffective to suspend the dismissal order and reliance again upon *Union Stock Joint Land Bank* v. *Byerly*, 310 US 1, 8.)

Answer: For the sake of argument let it be granted that the federal court dismissal order was effective before the state "confirmation" order.

Yet neither the dismissal order nor the entry of the "confirmation" could *ex post facto* go back eleven months

to an order of sale (void by statute), and nine months to a sheriff's sale (in defiance of a restraining order) and give them life as of the date when the *void* order and sale were attempted. The dismissal order could *speak only from its entry.* See page 5 of this Brief under the heading "Page 3 of the Brief of Davis, et al." where the theory here answered is fully discussed.

Page 8 of the Brief of Peoples Bank, et al., etc.

(That the defendant in foreclosure having directly attacked the orders of the state court and no appeal having been taken, there can be no collateral attack because of *res judicata.* Citing *Sunshine* v. *Adkins,* 310 US 381; *Treinies* v. *Sunshine,* 308 US 66; *Bernards* v. *Johnson,* 314 US 19; *Robertson* v. *Howard,* 229 US 254; *Wheat* v. *Texas,* 153 F. 2d 926.)

Answer: This contention, made also in the Davis brief, is fully answered beginning at the foregoing page 14.

As in the Davis brief, the Peoples Bank brief itself demonstrates that the judgment of the Supreme Court of Ohio is in direct conflict with the Constitution of the United States, the law of the United States and the decisions of this Court.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for Joseph G. Wenning,
Petitioner.

Lima, Ohio
October 16, 1950.

FILED
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CHARLES ELMORE CROPLEY
CLERK

No. 293

IN THE

Supreme Court of the United States

Appeal from
The Supreme Court of Ohio

Case No. 32075 in that Court

JOSEPH G. WENNING,

Appellant,

vs.

THE PEOPLES BANK COMPANY OF COLDWATER, OHIO; et al.,

Appellees.

BRIEF OF APPELLANT OPPOSING MOTION OF CERTAIN APPELLEES TO DISMISS APPEAL.

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UNITED STATES LAW PRINTING CO., CHICAGO 16, ILL. LA KEVIEW 5-6581

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BRIEF OF APPELLANT OPPOSING MOTION OF CERTAIN APPELLEES TO DISMISS APPEAL.

Procedure.

On July 25, 1950 certain of the appellees served upon counsel for respondent their motions under Rule 12, paragraph 3, to dismiss this appeal each being entitled "STATEMENT AGAINST JURISDICTION OF THE UNITED STATES SUPREME COURT AND MOTION".

This printed Brief of the Appellant opposing said motions is filed in this Court pursuant to Rule 7, paragraph 3.

Method of This Brief.

Henry J. Knapke, Esq., counsel for certain of the appellees, and Carleton E. Reiser, Esq., counsel for certain other of the appellees, filed separate motions to dismiss this appeal for want of jurisdiction which are in part identical in wording.

The last three paragraphs of the motion and statement of grounds filed by Attorney Knapke are identical in wording with the motion and statement of grounds supporting it filed by Attorney Reiser.

At this place this brief will answer the first part of Mr. Knapke's statement and then answer the identical portions.

PRELIMINARY STATEMENT.

For a clear comprehension of the issues over jurisdiction raised by the Statements and Motions of appellees and this Brief a recapitulation of the procedures may be helpful. Only so much is here set out as will suit the present purpose.

1. The laws of Ohio provide for foreclosure of a real estate mortgage in which an order of sale must be issued whereupon the real estate is sold as upon execution. GC of Ohio Secs. 11588, 11688.

2. Three distinct United States statutes are involved:
(a) Sec. 75 (a) to (r) of the Bankruptcy Act [Title 11, USC Sec. 203 (a) to (r)] enacted March 3, 1933, never held unconstitutional, providing for composition or extension

by agreement between a farmer debtor and his creditors, invoked by petition filed in a federal court, without any adjudication of bankruptcy as a farmer debtor.

(b) Sec. 75 (s) [Title 11, USC Sec. 203(s)], enacted June 28, 1934, invoked by the filing of an amended petition, providing, upon failure to reach agreement, for adjudication and for a five year moratorium, which was held to be unconstitutional in *Louisville* v. *Radford*, 295 US 555 on May 27, 1935.

(c) To take the place of the unconstitutional Sec. 75(s) a new Sec. 75(s) was enacted on August 28, 1935, also invoked by an amended petition, providing for adjudication as a farmer debtor and for a moratorium which was decided to be constitutional in *Wright* v. *Vinton*, 300 US 440, on March 29, 1937.

3. On September 7, 1934, a state foreclosure case, No. 12534, was filed against the appellant's farm real estate by the Peoples Bank, holder of a second mortgage. Ex. 1.

4. Thereafter on October 2, 1934 the appellant filed his petition as a farmer debtor in the federal court, Case No. 11200, under Sec. 75 (a) to (r) for composition or extension. Ex. 2, 3, 6, 7. (It is a coincidence that the farmer debtor petition in *Kalb* v. *Feuerstein*, 308 US 433, was filed in the federal court in the Wisconsin case on the same day. This is but one of the many striking likenesses of the two cases.)

5. Fourteen days thereafter on October 16, 1934, while the Sec. 75 (a) to (r) case 11200 was pending in the federal court, the state court entered judgment in foreclosure of the second mortgage to the Peoples Bank. Ex. 9.

6. On January 24, 1935, while the Sec. 75 (a) to (r) 11200 case still was pending, the state court issued execution for sale of the real estate in foreclosure. Ex. 10.

7. On February 21, 1935, the appellant who had failed to reach agreement with his creditors filed his amended petition in the federal court in the same case 11200, under the first Sec. 75 (s). Ex. 11.

8. On May 27, 1935 the procedure under this first Sec. 75(s) was knocked out by the decision of unconstitutionality of Sec. 75(s) in *Louisville* v. *Radford*, 295 US 555.

9. On August 6, 1935 this 75(s) case 11200 was dismissed. Ex. 2.

10. On August 28, 1935, the new Sec. 75(s) was enacted.

11. On April 25, 1936, the state court in its foreclosure case 12534 issued a new order of sale, but it was returned without execution on June 5, 1936. Ex. 1.

12. On October 7, 1937 the appellant moved in the federal court for reinstatement of his case 11200 which was denied on October 18, 1937. Ex. 2.

13. On January 26, 1938 the state court in foreclosure case 12534 entered its judgment and decree of foreclosure to the Federal Land Bank on its first mortgage. Ex. A.

14. Two days thereafter on January 28, 1938, the appellant filed in the federal court in Case No. 14344 a new petition for composition or extension under Sec. 75 (a) to (r) which was approved and referred to conciliation commissioner Rice. Ex. 12, 13, 14.

15. On January 31, 1938 while the new federal court case 14344 was pending, the state court in the foreclosure

case 12534 issued another order of sale under which an appraisement was returned. Ex. 16.

16. On March 2, 1938, agreement with creditors having failed in the new Sec. 75(s) case 14344 the appellant filed his amended petition in the same case under the new Sec. 75(s) which was referred to conciliation commissioner Rice. Ex. 17, 18, 19.

17. On March 3, 1938 the Federal Land Bank moved in the federal court case 14344 to dismiss the proceeding. Ex. 3.

18. On March 9, 1938 conciliation commissioner Rice issued and served upon the sheriff, the judge and attorneys for the Land Bank in the state foreclosure case 12534 notice of the exclusive jurisdiction of the federal court and a restraining order against any procedure in foreclosure. Ex. 20, 21.

19. On March 12, 1938, the sheriff sold the real estate in foreclosure case 12534 and two days later on March 14, 1938 reported sale to the Peoples Bank, holder of the second mortgage.

20. On October 10, 1938 the federal court dismissed the 75(s) case 14344. Ex. 3. Ex. C.

21. On November 16, 1938 the appellant filed his petition for a rehearing of the dismissal of case 14344. Ex. 3. Ex. D.

22. On December 17, 1938 the state court confirmed the sale in foreclosure in case 12534 and the sheriff issued a deed to the cashier of the Peoples Bank. Ex. 22.

23. On January 11, 1939 the petition for rehearing of the dismissal order was denied by the federal court in case 14344. Ex. 3. Ex. D.

RESPONSE TO ATTORNEY KNAPKE'S SEPARATE GROUNDS OF THE STATEMENT AGAINST JURISDICTION AND MOTION TO DISMISS.

This response to Attorney Knapke's separate grounds will follow the order of his Statement from its beginning.

I.
First Paragraph of Mr. Knapke's Statement.

In which, after stating the foreclosure petition was filed in the state court before the farmer debtor petition was filed in the federal court it is concluded that:

> "The voluntary dismissal by Wenning of the entire proceedings under # 75, 11 USCA # 203, on August 6th, 1935, rendered such proceedings, nugatory and the conditions were then the same as if such proceedings were never instituted in the Federal Court."

The quoted statement is not true as a matter of law. It is true that the petition seeking foreclosure in the State Court was filed before the farmer debtor petition 11200 was filed in the United States Court under the federal statute. This farmer debtor *petition* was for composition or extension pursuant to subsections (a) to (r) of that statute and ran its full course without dismissal.

But while that farmer debtor *petition* under Sec. 75 (a) to (r) *was pending* in the United States Court the State Court purported to render a judgment and decree in foreclosure in favor of the Peoples Bank which held a second mortgage. This was an absolute nullity by the express provisions of Section 75 (a) to (r), namely subsections (n) (o) and (p) [T 11, USC 203 (n) (o) and (p)], under which

the farmer debtor *petition* was pending. As was categorically stated sixteen times by this court unanimously in *Kalb* v. *Feuerstein*, 308 US 433, the state court judgment and decree in foreclosure was absolutely void—a nullity.

The dismissal referred to was of an *amended petition* filed under another federal statute, the original Sec. 75(s) [T 11 USC 203(s)], above referred to, which provided for additional procedure after the procedure under Section 75 (a) to (r) should be finished. This subsection (s) had been enacted June 28, 1934 MORE THAN 15 MONTHS AFTER the enactment of Sec. 75 (a) to (r).

Promptly on February 21, 1935, after the completion of the procedure under Sec. 75 (a) to (r), the appellant filed his *amended petition* in case 11200 as required under that 75 (s) and was adjudicated a farmer debtor bankrupt.

Thereafter on May 27, 1935 this Court in *Louisville* v. *Radford*, 295 US 555, held that first subsection (s) to be unconstitutional and thereby the farmer debtor *amended petition* under subsection (s) was completely out of court and the appellant requested that his adjudication as a farmer debtor bankrupt under subsection (s) be vacated and his amended petition dismissed and the court complied.

But neither the proceeding under the invalid subsection (s) nor the decision in *Louisville* v. *Radford*, 295 US 555, effected the preceding proceeding under subsections (a) to (r). The decision in *Louisville* v. *Radford*, 295 US 555, holding subsection (s) to be unconstitutional did not relate to subsections (a) to (r) nor effect their validity and therefore subsections (n) (o) and (p) stood without impairment in full force, and the judgment and decree of the state

court in foreclosure remained a nullity, as it was when the judge purported to issue it.

The state court was by the effect of *Louisville* v. *Radford*, 295 US 555, restored to its jurisdiction in foreclosure as of the date of the completion of proceedings under subsections (a) to (r). But the proceedings under the still existing and unimpaired statute, Sec. 75 (a) to (r), a separate and distinct statute which was never held to be unconstitutional, were not effected and the effect of subsections (n) (o) and (p) in rendering the foreclosure judgment and decree an absolute nullity STILL REMAINS. Reassumption of jurisdiction in the State Court could not put life into what never had life.

The farmer debtor proceeding which was involved in *Kalb* v. *Feuerstein*, 308 US 433 was filed in the United States Court in Wisconsin on the same date the Wenning farmer debtor petition was filed in the United States Court in Ohio, that is on October 2, 1934. The 75 (s) proceeding in the *Kalb* case fell a victim to the same decision of this Court in *Louisville* v. *Radford*, 295 US 555, and was dismissed for the same reason that Wenning's case was dismissed. It was under such identical circumstances that this court in *Kalb* v. *Feuerstein*, 308 US 433, held all proceedings in the State Court which were conducted while the farmer debtor petition under Sec. 75 (a) to (r) was pending to be absolute nullities, a decision that fits this *Wenning* case like a glove.

It is therefore false to say as noted above that: "The voluntary dismissal by Wenning of the entire proceedings under # 75, 11 USCA # 203, on August 6, 1935, rendered such proceedings nugatory and the conditions were then

the same as if such proceedings were never instituted in the Federal Court." for the purported judgment and decree in foreclosure remained as when promulgated, a nullity as in the *Kalb* case.

II.

Second Paragraph of Mr. Knapke's Statement.

Anent the judgment to the Federal Land Bank, holder of the first mortgage, on January 26, 1938.

This judgment was valid because the state court then had unimpaired jurisdiction as had been repeatedly stated in arguments and briefs on behalf of the appellant at every stage of this case from its inception. It is a valid judgment to this day but its validity has no bearing on the issue now before this Court.

III.

Third Paragraph of Mr. Knapke's Statement.

That on October 10, 1938 the United States Court dismissed the farmer debtor (in Case 14344) and ordered all stay orders "set aside and held for naught".

To properly comprehend the intended import of the foregoing statement it is advisable to explain the further history of the attempts of the appellant to save his farm.

On August 28, 1935, following this Court's holding of invalidity of the first subsection (s), a new subsection (s) had been enacted which this court unanimously held to be constitutional in *Wright* v. *Vinton*, 300 US 440. After that decision the appellant applied to the United States Court to have his farmer debtor case 11200 reinstated but was denied. It was after his failure to have his farmer debtor case 11200 reinstated that the Federal Land Bank judgment was taken on its first mortgage.

Two days after that judgment and decree of foreclosure was taken, that is on January 28, 1938 the appellant filed another farmer debtor petition in the federal court in case 14344 which he had a right to do. *Wragg* v. *Federal*, 317 US 325, 328; *Re Boyer*, 138 F. (2d) 349, CCA 8; *Feuerstein* v. *Kalb*, 127 F. (2d) 509, CCA 7; *Howell* v. *Federal*, 92 F. (2d) 703, CCA 9. This new petition under subsections (a) to (r) for composition or extension went through the complete procedure provided by those subsections and again the creditors refused to agree. It was during this procedure, despite the plain terms of subsections (n) (o) and (p), that the state court issued its order of sale as provided by the General Code of Ohio section 11588 that "When a mortgage is foreclosed or a specific lien is enforced, a sale of the property shall be ordered." That is, the state court considered GC 11588 of Ohio as valid though it was clearly repugnant to sec. 75 (T 11 USC 203). *Kalb* v. *Feuerstein*, 308 US 433.

In further pursuance of the Ohio law and in defiance of the United States statute the appellant's property was appraised and the appraisement returned and filed in the state court in preparation for sale in foreclosure. The dismissal order in 14344 referred to in the third paragraph of Mr. Knapke's state-

ment was not entered until after all procedure under the petition for Composition or Extension under subsections (a) to (r) had been completed. Thereafter, pursuant to the new sec. 75(s) the appellant filed his amended petition in Case 14344 under which he was adjudicated a farmer debtor bankrupt and his case was referred to conciliation commissioner Rice for administration. The conciliation commissioner issued and served a restraining order upon the judge of the state court, upon the sheriff, and upon attorneys for the Federal Land Bank giving notice of the exclusive jurisdiction of the United States Court and restraining the judge, the sheriff and the Federal Land Bank from taking any action in the State Court. Ex. 20, 21. Despite this restraining order the sheriff purported to conduct the sale and report to the State Court that he had sold the real estate to the Peoples Bank Company, one of the appellees herein.

It was seven months thereafter, on October 10, 1938, that the order of dismissal in Case 14344 was entered by the United States Court granting a motion which had been filed by the Federal Land Bank *after the amended petition* under subsection (s) was filed in the United States Court.

This order of dismissal was erroneous as this Court unanimously held in *John Hancock* v. *Bartels*, 308 US 180, where Chief Justice Hughes for the court said,

> at page 183: "We think that the District Judge failed to follow the mandate of the statute" . . .; at pages 183-184: "Subsection (s) of Sec. 75 as amended by the Act of August 25, 1935, prescribes a definite course of procedure. That subsection applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors" . . .; page 184: "The subsections of Sec. 75 which regulate the procedure in relation to the effort of a farmer debtor to obtain a composition or extension

contains no provision for a dismissal" . . .; at page 187: "The scheme of the statute is designed to provide an orderly procedure so as give whatever relief may properly be afforded" . . .; at page 187: "We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe."

This court again held that a District Court could not dismiss a farmer debtor proceeding in *Wright* v. *Union Central,* 311 US 273, where the unanimous court, opinion by Justice Douglas, held that the statutory procedure must be followed.

Again in *Wright* v. *Logan,* 315 US 139, this court unanimously held, opinion by Justice Black, that a farmer debtor case could not be dismissed but must be administered as prescribed by the statute.

Without saying so, it would seem that Mr. Knapke's words in the third paragraph of his Statement that "all stay orders heretofore entered hereunder are set aside and held for naught" imply that the conclusion shall be that all of the said procedures, in defiance of subsections (n) (o) and (p), were thereby endowed with a life and effectiveness they never had. *Kalb* v. *Feuerstein,* 308 US 433. These proceedings were (1) the void order of sale on January 31, 1938 and (2) the appraisement on February 8, 1938, both during the pendency of the petition in 14344 under subsections (a) to (r) and occurring only a few days after its filing.

Apparently it is intended that it shall also be concluded that the void proceedings in the state court during the pendency in the federal court of the amended petition in

14344 under subsection (s) were likewise endowed with life by such dismissal. These state court proceedings were (3) the sheriff's sale and (4) his report, conducted and filed not only in defiance of the exclusive jurisdiction of the federal court but in defiance of the specific notice and restraining orders issued by the federal court which had been issued and served upon sheriff, judge and attorneys for the Federal Land Bank three days prior to the purported sale. Ex. 20, 21.

The order of dismissal of the Sec. 75(s) amended petition in 14344 was not entered until October 10, 1938—seven months after the sale! So it all boils down to this:

"Absolutely Essential Prerequisites"

In support of the text of the paragraph beginning at the lower part of page 13, the following is quoted:

27 Ohio Jurisprudence, "Mortgages" section 522, page 696: "*A judicial sale has its very foundation in a decree or order of sale passed by a court of competent jurisdiction. By the express command of the Code, when a mortgage is foreclosed a sale of property shall be ordered;*" General Code of Ohio, section 11,588. Emphasis supplied.

24 Ohio Jurisprudence, "Judicial Sales" section 13, page 17: "A judicial sale has its *very foundation in a decree or order of sale passed by a court of competent jurisdiction. It is the decree that supplies the authority upon which the officer to make the sale must act.* Furthermore, purchasers at a judcial sale are protected when the power to make the sale is expressly given; otherwise they are not. Not only is an order of sale necessary to make a valid sale, but the order must be made prior to the sale." Emphasis supplied.

contains no provision for a dismissal" . . .; at page 187: "The scheme of the statute is designed to provide an orderly procedure so as give whatever relief may properly be afforded" . . .; at page 187: "We are not here concerned with questions which may arise in the course of the administration under the statute, but merely with the duty to follow the procedure which the statute defines and the District Court failed to observe."

This court again held that a District Court could not dismiss a farmer debtor proceeding in *Wright* v. *Union Central,* 311 US 273, where the unanimous court, opinion by Justice Douglas, held that the statutory procedure must

14344 under subsection (s) were likewise endowed with life by such dismissal. These state court proceedings were (3) the sheriff's sale and (4) his report, conducted and filed not only in defiance of the exclusive jurisdiction of the federal court but in defiance of the specific notice and restraining orders issued by the federal court which had been issued and served upon sheriff, judge and attorneys for the Federal Land Bank three days prior to the purported sale. Ex. 20, 21.

The order of dismissal of the Sec. 75(s) amended petition in 14344 was not entered until October 10, 1938—seven months after the sale! So it all boils down to this:

Order of sale and appraisement by state court in violation of sec. 75 (n) (o) and (p) and specifically held to be nullities by *Kalb* v. *Feuerstein*, 308 US 433.

Sheriff's sale and report of sale in defiance of specific restraining orders served upon sheriff, judge and attorneys for the mortgage holder.

If these absolutely essential prerequisites under Ohio law to a valid divestment of title in Ohio foreclosure proceedings, which the United States statute makes absolute nullities when attempted, are to be ex post facto endowed with life as of the time they were illegally attempted (such endowment being by the instrument of a federal court dismissal order which this court has time after time held to be beyond the power of the federal court) then the United States Constitution, the Statutes of the United States and the solemn declarations of this court are but vain mockeries and all obstreperous defiers of the "Supreme law of the land" need to do is to go ahead and defy exclusive federal jurisdiction in the hope that sub-

sequently a federal court will disobey the federal law by dismissing the case.

This can not be. Even where a court exercised its authority under an act [the original 75(s)] subsequently declared to be unconstitutional this court held that such exercise was judicial or ministerial and therefore valid. *Adair* v. *Bank*, 303 US 350, opinion by Justice Reed. That is, even the declaration of unconstitutionality of a federal statute did not ex post facto undo what had been done under it.

Here both 75(a) to (r) and the new 75(s) were constitutional. There was never any dismissal of the 75 (a) to (r) proceeding in case 14344 under which, by subsection (n) (o) and (p), the order of sale and appraisement were utterly void. *Kalb* v. *Feuerstein*, 308 US 433.

Here also the sheriff's sale and report were in defiance of the court's restraining order served on judge, sheriff and attorneys for the Federal Land Bank. Ex. 20, 21. Let us examine what follows if the implied theory of "dismissal undoes prior orders ex post facto" is the law. Suppose in a divorce case the court issues an order and punishes by imprisonment one who disobeys that order and subsequently the court dismisses the case. May the prisoner then sue for false imprisonment—and whom shall he sue, judge, party, counsel, sheriff, clerk?

To imply that because the federal court dismissed a case pending under one statute [subsection (s)], such dismissal could activate utterly void proceedings, under another statute, so adjudicated by this court (*Kalb* v. *Feuerstein*, 308 US 433) and could also activate other proceeding in the dismissed case performed in defiance of a court re-

straining order issued, served and defied seven months previously, is contrary to law *and* fact. The assertions and implications involved in the third paragraph of Mr. Knapke's statement neatly point up the drawing in question of the validity of a United States statute, a decision against its validity, the validity of a state statute as repugnant to the Unted States statute and a decision favoring its validity.

IV.

Fourth and Fifth Paragraphs of Mr. Knapke's Statement.

Which read: "On December 17th, 1938, the Court of Common Pleas of Mercer County, Ohio, confirmed the sale of said real estate to the purchaser, as the result of a sale held by the sheriff on March 12th, 1938, and Joseph G. Wenning did not have a federal case pending in bankruptcy at that time. The state court had exclusive jurisdiction of the parties and subject matter when the decree of confirmation was entered and its decree cannot be collaterally attacked. (*Robertson* v. *Haward*, 229 U. S. 254)

In the case of *Union Joint Stock Land Bank of Detroit* v. *Byerly*, 310 U. S. 1, the court said: 'The sale was, however, incomplete until confirmation by the Court. Until confirmation it amounted to an unaccepted offer to purchase. No sale was consummated while the bankruptcy proceedings were pending. The termination of the bankruptcy proceedings restored the jurisdiction and power of the State Court . . . Although the State Court's jurisdiction was suspended by that of the bankruptcy court it again attached upon the dismissal of the bankruptcy case,

and, thenceforward, as respects the foreclosure suit, and the State Court's proceedure, it was as if no bankruptcy case had ever existed'.

After discussing the actions of the State Court in the *Byerly* case, the court in its opinion said:

> 'If it erred in that respect its action was subject to correction by appeal but not subject to attack in a collateral proceeding'."

(End of quotation from Mr. Knapke's statement.)

There is some question whether the State court had jurisdiction when it entered a confirmation of the purported sale. This is true because a petition for rehearing of the order of dismissal of case 14344 by the federal court was then pending in the federal court which was not denied until the following month. Ordinarily the pendency of a petition for rehearing of an order suspends the entry of the order and it does not become effective until the petition for rehearing is denied and ten days thereafter. Rule of Civil Procedure 63(a) which was then in effect and based on long-standing law. This would make the entry of dismissal effective January 21, 1939, ten days from the denial of the petition for rehearing, which date was *more than a month after the order of confirmation of sale by the state court.* That is, the farmer debtor proceeding in case 14344 under subsection (s) was still within the exclusive jurisdiction of the federal court when the state court presumed to confirm the void sale.

Robertson v. *Howard,* 229 US 254, cited in Mr. Knapke's Statement above quoted, was in *general bankruptcy,* not a farmer debtor case under Sec. 75, (a very different statute) in which the federal court had exclusive jurisdiction

at all times and the referee in bankruptcy, an officer of the bankruptcy court, had full *power* to order and conduct a sale of the property within the bankruptcy court's exclusive jurisdiction. Sec. 75 (11 USC 203) deprived the state court of all power to act in any way while a farmer debtor proceeding pends in a federal court. The referee in the general bankruptcy case did in the wrong way what he had full power to do and the remedy was by review in the same case. In other words there could be no collateral attack against his erroneous exercise of his power. But a state court has no POWER when a farmer debtor case is pending in a federal court. For example *Kalb* v. *Feuerstein*, 308 US 433, (which was on appeal from the State Supreme Court to this Court) originated in the state court as a collateral attack upon foreclosure proceedings in the Wisconsin state court, no review ever having been sought in the foreclosure case. Likewise in *Wright* v. *Union Central*, 304 US 502, (opinion by Justice Reed) *two* decisions of courts of last resort of Indiana were disregarded. *Exclusive jurisdiction* in the federal court means that a state court has no POWER and all procedure in a state court is nothing—a nullity—and is subject to collateral attack.

Union Joint Stock Land Bank v. *Byerly*, 310 US 1, is not on even "two-fours" with this case. There the federal judge by his formal order, in a case pending in the federal court under Sec. 75, expressly directed the state court to proceed with sale in foreclosure (on the creditor's plea that expense had been incurred in advertising it before the federal jurisdiction had been attached). This Court recognized that such an order was an error occurring within the exclusive power of the federal court, but held that

the state court was justified in taking it for granted that the federal judge knew federal law and that the sale could properly proceed. It further held that the federal judge, though having POWER, granted in Sec. 75 (o), to authorize state court action in the pending foreclosure, had not pursued the proper proceedure in granting it. Therefore, said the majority, the erroneous order of the district court was subject to correction by review, but it was not void because he had POWER to act and therefore was not subject to collateral attack.

Even so three justices (namely Justices Black, Douglas and Murphy) in their dissenting opinion of more than six pages open and closed their dissent with the statements 1 that the effect of the majority decision "would be largely to defeat the purposes of the Act" (page 11) and 2 that it provided "a ready means of circumventing the Act." (page 16).

It is clear that the attempt in the Wenning foreclosure by the state court to confirm what were utterly void proceedings—*i.e.* nullities—was itself based upon that court's conception that a state statute repugnant to a federal statute was valid and the decision of the state court in confirming the sale was a holding that the federal statute was invalid.

RESPONSE TO THE IDENTICAL GROUNDS OF THE TWO STATEMENTS AGAINST JURISDICTION AND MOTIONS TO DISMISS BY ATTORNEYS KNAPKE AND REISER.

V.

Such identical grounds in the two motions read as follows in each motion:

> "In the decisions as rendered by the State Courts (Common Pleas; Court of Appeal and Supreme Court) there were no decisions against the validity of any of the numerous statutes of the United States that are numbered and quoted in the statement in support of jurisdiction, as had been filed by the appellant herein.
>
> In none of the opinions in the State Courts as decreed, was there drawn in question the validity of a state statute of Ohio on the ground of its being repugnant to the Constitution or laws of the United States and the decision in favor of the validity of the state statute.
>
> WHEREFORE: As the decision of a federal question was not necessary to the judgments rendered and was not made the ground of such judgments, the respondents move that the appeal of Joseph G. Wenning be dismissed for want of jurisdiction."
>
> (End of quotation from statement and motions of attorney Knapke and attorney Reiser.)

The petition (fol. 43), , (the "Second Amended Petition" filed February 28, 1948) complains that the state court judgment to the Peoples Bank, the

execution thereon, the order of sale, appraisement, and the sheriff's sale were severally null and void because they were in violation of the laws of the United States, naming them specifically, and contrary to the Constitution of the United States enumerating the various proceedings in the United States Court based upon said federal statutes and their application to the state proceedings.

The Common Pleas Court was of the opinion (fol. 65), , that the interdicted acts of the Common Pleas Court were "ministerial procedural acts under the Statutes of the State of Ohio" thus putting the case squarely in line with the procedures in the Wisconsin state foreclosure case involved in *Kalb* v. *Feuerstein*, 308 US 433.

Also the opinion held that the state statutes provide "that the Court" . . . "examine the proceedings of its officers, and if found to be in accordance with the statutes, shall confirm same and order a deed."

The opinion further queried whether if any of the acts of the state court were "irregular or void, do not the Ohio statutory provisions which provide for the procedure provide that it is the Court of this state which shall make the determination as to the validity of those acts?"

Also: "if the" [state] "Court did commit error, the plaintiff was afforded due process of law by his right of hearing and his right to take the matter to the Court of Appeals on error." [in the state court].

And again: "There has been no conflict in this case with either Federal Law or the Constitution of the United States."

And: "The Courts ruling on the motion" [for a new

trial] "was a final order from which plaintiff could have appealed but he did not do so."

The foregoing extracts demonstrate that the decision of the Common Pleas Court was squarely against the validity of the United States statutes which were drawn in question.

They demonstrate that the validity of the state statutes were drawn in question on the ground of their being repugnant to the Constitution and laws of the United States and the decision was in favor of the statute statutes.

No question was decided except the federal question which was held to be decisive thus dispensing with the consideration of other matters. The opinion concludes with the statement that "In view of the Court's finding it is not necessary to make a determination of other matters". . . .

The Court of Appeals of Ohio affirmed the Common Pleas Court holding in its opinion, in somewhat different language, precisely the same as the opinion of the Common Pleas Court.

The Supreme Court of Ohio, without opinion, merely dismissed the appeal as of right on the ground that "no Constitutional question is involved" and denied the motion to direct the Court of Appeals to certify the record for review.

It is not asserted on behalf of appellant that the state statutes relating to foreclosure and the enforcement of a lien were wholly invalid under all circumstances and for every purpose. It is asserted that as to the state of facts set out in the petition and evidence those state statutes were invalid because repugnant to the Constitution of the

United States and the laws of the United States made in pursuance thereof. As the state courts applied to the disadvantage of the plaintiff-appellant, and to his grevious injury, those state laws as being valid in application to facts and circumstances coming under the federal statutes the cause is appealable under T 28 USC 1257, paragraph 1. [Formerly Judicial Code section 237(a)]. *Dahnke-Walker* v. *Bondurant*, 257 US 282, 289-290.

Wherefore the appellant prays that the motion of the appellees be denied for the reason that clearly this court has jurisdiction and in the words of this Court in *Murdock* v. *Memphis*, 20 Wallace (87 US) 590, "must hear the case on its merits"; to prevent the state courts "from impairing or frittering away the authority of the federal government", *Missouri* v. *Andriano*, 138 US 496; "to maintain the supremacy of the Constitution and laws of the United States", *Harkrader* v. *Wadley*, 172 US 148; "to secure the independence of the General Government in the sphere of action assigned to it; to make the Constitution and laws of the United States uniform, and the same in every state" (not one construction for Wisconsin, another for Ohio); and to exercise its revising power to the end that its decisions shall be "final and obligatory on all other judicial tribunals, State as well as federal", *Green* v. *Neil*, 6 Peters (31 US) 291.

Respectfully submitted,

ELMER MCCLAIN,
Counsel for appellant,
Joseph G. Wenning.

Lima, Ohio
August 5, 1950

No. 293. WENNING *v.* PEOPLES BANK CO. ET AL. Appeal from, and petition for writ of certiorari to, the Supreme Court of Ohio. *Per Curiam:* The motions to dismiss are granted and the appeal is dismissed. The petition for writ of certiorari is denied. MR. JUSTICE BLACK, MR. JUSTICE REED, and MR. JUSTICE DOUGLAS are of the opinion that this case should be set down for argument and that further consideration of the question of jurisdiction should be postponed to the hearing of the case on the merits. *Elmer McClain* for appellant-petitioner. *Kahl K. Spriggs* for the Peoples Bank Co. et al.; and *Carleton Carl Reiser* and *Alexander M. Heron* for Davis et al., appellees-respondents. Reported below: 153 Ohio St. 583, 92 N. E. 2d 689.